United States Court of Appeals

for the Second Circuit

EXHIBITS

74-2150

FIRST COPY

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

National Labor Relations Board

B

DOCKET NO. 3-RC-5853
3-CA-5506

IN THE MATTER OF:

TRADING PORT, INC.

Respondent

-and-

LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner

PLACE: Albany, New York

DATE: Tuesday, March 5, 1974

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

Third Region

In the Matter of:	:	
TRADING PORT, INC.	:	
Respondent	:	
-and-	:	Case No.
LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	:	3-RC-5853
Petitioner	:	
TRADING PORT, INC.	:	
-and-	:	Case No.
LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	:	3-CA-5506

Hearing Room
The Standard Building
11th Floor
112 State Street
Albany, New York

Tuesday, March 5, 1974

The above-entitled matter came on for hearing, pursuant to Notice, at 1:00 p.m.

BEFORE:

Honorable JAMES V. CONSTANTINE, Administrative Law Judge

APPEARANCES:

THOMAS J. SHERIDAN, Esq. MICHAEL MILLER, Esq.	National Labor Relations Board, Third Region, 112 State Street, Albany, New York; appearing as Counsels for the General Counsel.
EDWARD L. BOOKSTEIN, Esq.	Kohn, Bookstein & Karp 100 State Street Albany, New York; appearing on behalf of the Respondent.
WILLIAM POZEFSKY, Esq. DOMINICK TOCCI, Esq.	Pozefsky, Tocci & Pozefsky 112 State Street Albany, New York; appearing on behalf of the Charging Party.

- - - - -

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
James Dillenbeck	12	96	110	--

EXHIBITS	FOR IDENTIFICATION	IN EVIDENCE
General Counsel's:		
GC-1(a) thru (bb)	7	8
Board's:		
B-2(a) thru (d)	7	8
General Counsel's:		
GC-2(a) thru (s)	21	21
GC-3(a) thru (h)	26	28
GC-4	74	76
GC-5	74	76
GC-6	74	76

P R O C E E D I N G S

1:00 p.m.

JUDGE CONSTANTINE: The trial will please come to order.

This is a formal trial in the matter of the Trading Port, Inc., a consolidated case, consisting of Case No. 3-CA-5506 and 3-RC-5853.

At this time Counsel and other representative of the parties may enter their appearances for the record.

MR. SHERIDAN: Thomas J. Sheridan and Michael Miller, Counsel for the General Counsel, 112 State Street, Albany, New York.

MR. POZEFSKY: William Pozefsky of Pozefsky, Tocci and Pozefsky, 112 State Street, Counsel for the Charging Party.

MR. BOOKSTEIN: Kohn, Bookstein and Karp by Edward L. Bookstein, 100 State Street, Albany, New York, attorneys for the Respondent.

JUDGE CONSTANTINE: The Trial Examiner designated to hear the -- did you put your address --

MR. BOOKSTEIN: Well, I guess we're in two halves, in both the Charge case and the Objection case. I did give the address, yes.

JUDGE CONSTANTINE: I'm going to hear the case. My name is James V. Constantine.

At this time I believe the formal papers should be

introduced in the record. I can't proceed without them. That's a Board formality.

I should say you've seen all of those except the Affidavits of Service. They've all been served on you.

If you have something to say, Mr. Pozefsky, please say it.

MR. POZEFSKY: I'd like the record to indicate that the Respondent is apparently recording on a tape recorder the proceedings here. I'd like to know what the purpose of the recording is.

JUDGE CONSTANTINE: You'll have to ask them. I don't know.

MR. POZEFSKY: Yes.

MR. BOOKSTEIN: Well, our purpose is to have a recording of the proceeding, and, of course, I'd like the record to show that prior to the -- to this hearing's formally convening, I did ask Mr. Constantine his attitude towards our doing that because one of the representatives of the Respondent had requested that he be permitted to do it. I understand that it is permissible.

JUDGE CONSTANTINE: But I want to make it clear that when you come to right anything in the case, whether you win or lose, you may not use that. You will have to go by the official transcript, which is by the reporter in this case. I want to make that very clear.

MR. BOOKSTEIN: I understand that, sir.

JUDGE CONSTANTINE: All right. Is there any objection to the introduction into evidence of those documents?

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: All right. In that case they will be received in evidence. Mark them received, please, Mr. Reporter.

MR. SHERIDAN: Do you want them received, your Honor?

JUDGE CONSTANTINE: Yes, but I want the Reporter to mark them.

MR. SHERIDAN: Two sets of exhibits, General Counsel's and Board.

JUDGE CONSTANTINE: Well, you mark them 1 or 2, or whatever -- any way you want, but be sure -- does the Reporter know how you want them marked?

MR. SHERIDAN: Yeah. Those are separate. That will be General Counsel's exhibit and that will be the Board exhibit.

(Documents handed to Reporter.)

MR. BOOKSTEIN: Do you have a copy of those for me?

MR. SHERIDAN: No. We don't --

MR. BOOKSTEIN: All right. Maybe I can get a copy of just the face so I'll just have the exhibit numbers, okay?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: I might say for the record that you

have a copy of those. They've all been served on you except the top page, which is a descriptive page of what follows, a sort of index.

MR. BOOKSTEIN: Right, that's why I wanted to get a copy of the face sheet.

JUDGE CONSTANTINE: And the Affidavits of Service.

MR. BOOKSTEIN: That will be fine. Thank you very much.

JUDGE CONSTANTINE: Now what numbers have been given to those -- GC -- let's take, for my records, GC-1(a) through what?

MR. SHERIDAN: GC-1(a) through 1(bb), with 1(bb) being the Index and Description.

JUDGE CONSTANTINE: All right.

(The document above-referred to was marked General Counsel's Exhibit No. 1(a) thru 1(bb) for identification.)

JUDGE CONSTANTINE: Now what's the other one?

MR. SHERIDAN: The other one is Board Exhibit -- it's listed as 2 -- it should really -- well, we'll leave it as Board's 2 if everybody realizes there's no Board Exhibit 1. Board's Exhibit 2(a) through 2(d), with 2(d) being the Index and Description of those -- of that exhibit.

JUDGE CONSTANTINE: All right.

(The document above-referred to was marked Board's Exhibit

No. 2(a) thru 2(d) for identification.)

JUDGE CONSTANTINE: Those have been received in evidence, gentlemen.

(The document, heretofore marked General Counsel's Exhibit No. 1(a) thru 1(bb), was received in evidence.)

(The document, heretofore marked Board's Exhibit No. 2(a) thru 2(d), was received in evidence.)

JUDGE CONSTANTINE: Go ahead, Mr. Sheridan.

MR. SHERIDAN: Yes, your Honor. At this point I would like to make a motion to amend the Complaint in two respects. One is to correct the name of someone named in the Complaint. Wherever the name B-u-r-n-e-l-l appears, it should be B-r-u-n-e-l-l-e.

JUDGE CONSTANTINE: It should be -- again?

MR. SHERIDAN: B-r-u-n-e-l-l-e.

JUDGE CONSTANTINE: Instead of B-u-r-n-e-l-l?

MR. SHERIDAN: That's correct, your Honor.

JUDGE CONSTANTINE: All right. Any objection to that?

MR. BOOKSTEIN: None.

JUDGE CONSTANTINE: Mr. Pozefsky, I presume you don't object but you still have a right to.

MR. POZEFSKY: No.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Now the other respect I'd like to amend

is as follows: Under Paragraph 5 of the Complaint, the paragraph that appears there now should be numbered A, and I would like to add a paragraph 5-B as follows: At all times material herein the following named persons occupied positions set opposite their respective names and have been, and are now, agents of the Respondent, acting on its behalf, and are agents within the meaning of Section 213 of the Act. The individuals are: William Brunelle, Respondent Buyer and Warehouse Manager; Walter Snyder, Respondent Officer Manager; and William Stevens, Respondent Store Manager.

JUDGE CONSTANTINE: Well, before I pass on that -- before the Respondents decide whether they want to object or not, let me ask you this -- I'm asking it for the benefit of the Respondent's attorney so he'll know whether he wants to object or not. Are these people whom you added by 5-B of the Complaint going to be -- are you going to put in evidence concerning them and something they did?

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: This is kind of late to --

MR. SHERIDAN: Well, your Honor, just so it's clear, they're already named in the Complaint as supervisors. The purpose of this amendment is to allege them as agents under Section 213, in the event that some of the evidence does not show that they are supervisors. That's the purpose of this.

JUDGE CONSTANTINE: All right. Do you object?

MR. BOOKSTEIN: Well, I object to it on the grounds of timeliness, Mr. Examiner.

JUDGE CONSTANTINE: I think it -- considering the length of the case and the great number of instances of violations in your Complaint, which I freely admit I've read before I came here, I'm inclined not to grant it.

MR. SHERIDAN: Well, your Honor, may I point out something -- that up until last Friday, the status of Mr. Brunelle was not in issue. Respondent filed an amended Answer Friday in which for the first time Mr. Brunelle's status was placed in issue as not being a supervisor.

JUDGE CONSTANTINE: Well, why should he -- you should have found out before. Are you depending on them to tell you? They don't have to help you with your case.

MR. SHERIDAN: I understand that, but this was not an issue at the time, and then last Friday an amended Answer was filed, which, for the first time, placed in issue Mr. Brunelle's status. Now prior to that there was no issue as to his status.

JUDGE CONSTANTINE: Well, you should have known, regardless of whether there was an issue or not, what his status was. They're under no obligation to aid you in presenting your case.

MR. BOOKSTEIN: I think, Mr. Sheridan, you meant a week ago Friday.

MR. SHERIDAN: No.

JUDGE CONSTANTINE: Well, it doesn't matter when it was. The fact is that the Respondent under no circumstances has to aid you in preparing your case; besides, as I said, it's a long case, and if you prove the allegations of your case, you don't have to worry about this here. I read the Answer and I think there is something there like -- according to the Respondent, I didn't add them up -- somewhere between 150 and 180 8(a)(1). If you prove just a small part of those, you've proved your case.

I might say in advance, even at the risk of being criticized for it, that I'm not going to let you put in 180 instances of violations. After a while the thing is going to be cumulative. I tell you that right now.

All right, go ahead. Motion is denied.

MR. SHERIDAN: Shall I call my first witness?

JUDGE CONSTANTINE: Please do.

MR. SHERIDAN: James Dillenbeck.

Whereupon,

JAMES DILLENBECK

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: I want to say this for the benefit of all parties. In order to save time, because this is a

long case, you don't have to ask a witness what he is unless his status is in doubt. You can just say, you are James M. Bick, you work so and so, and your work is as follows. I assume that there won't be an objection to it -- in order to save time. You can lead on non-officials.

MR. SHERIDAN: Yes, sir.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Dillenbeck, did you ever work for Trading Port, Inc.?

A Yes, I did.

Q And when did you first start working for them?

A In January of 1962.

Q And what was your job?

A The last job I had with them?

Q Yes.

A I was the head railroad receiver.

Q And what was your wage rate?

A $4.10 an hour.

Q All right. Now, prior to 1973, did the employees have any sick benefits?

A At Trading you had five days sick leave a year.

Q How long had you had them?

A Two years previous to that, probably.

Q Now, near the end of 1972, did Mr. Robert Solomon give any instructions to the employees about the sick pay?

A He explained to us that if we did not use the five days we would lose them and we would not be paid for them.

Q And did some employees take sick time off at the end of the year?

A Toward the end of the year some of them did, yes.

Q Now as a result of their doing this, and directing your attention to around February of 1973, did Mr. Sam Tabachneck meet with the employees?

A Yes. Mr. Sam Tabachneck met with all the employees at the front desk in the warehouse. At that time he told us that he could not afford to continue to give the sick leave and also pay for our hospitalization, and we were given a choice as to whether to continue our five-day sick leave or pay part of our hospitalization.

Q And what did the employees choose to do?

A At that time, the employees chose to drop the sick leave.

Q By the way, at this point and through the end of your employment at Trading Port, did the employer pay any part of Blue Cross-Blue Shield?

A Yes. He paid all but a dollar a week on an employee, himself, personally.

Q Now after this meeting with Mr. Sam Tabachneck, what, if anything, did the employees discuss?

A Well, there was a lot of dissent about losing --

MR. BOOKSTEIN: I fail to see the materiality and relevancy of this. We're talking about a date which is some seven months prior to any of the events alleged in the Complaint.

JUDGE CONSTANTINE: What goes on among the employees is hearsay unless there is an Employer's representative present. Was there an Employer's representative present?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: All right, I'll sustain the objection.

Q (By Mr. Sheridan) All right. I direct your attention to a letter about August 23rd. Would you explain what, if anything, happened --

JUDGE CONSTANTINE: Will you please mention the year?

MR. SHERIDAN: 1975.

JUDGE CONSTANTINE: Thank you.

MR. BOOKSTEIN: I object unless a proper foundation is first laid.

JUDGE CONSTANTINE: I don't know whether it's material or not --

MR. BOOKSTEIN: He can tell us at the moment whether the question is going to call for an answer that's objectionable, for example, on the basis of hearsay.

JUDGE BOOKSTEIN: Well, let's wait and see what the question is, then you can object to it. Go ahead -- what's

the question, Mr. Sheridan?

MR. SHERIDAN: I direct his attention to August 23rd of '73, and asked him what, if anything, happened that day?

THE WITNESS: On that evening two other employees of the Trading Port, Frank Houck and Richard O'Toole and myself, we used to meet on Thursday nights and bull shoot. We had met and we were sitting around afterwards by the fire in Red's yard, Frank Houck's yard, and discussing the --

MR. BOOKSTEIN: I object to any conversation between these individuals out of the presence of a representative of the Employer.

JUDGE CONSTANTINE: All right, I'll sustain the objection.

You may show that they met --

MR. SHERIDAN: Are you saying that the Union activities of employees are not relevant in this case?

JUDGE CONSTANTINE: What they say is hearsay. The fact that they met -- you can ask them what they met about but not what went on, not the conversation.

Q (By Mr. Sheridan) All right, as a result of that meeting, what, if anything, did you do the next day, Mr. Dillenbeck?

A We began the next day to ask other employees whether or not they wanted to be represented by a union.

MR. BOOKSTEIN: Again --

JUDGE CONSTANTINE: No, the fact that they engaged in union activities is admissible. The conversation is not.

MR. BOOKSTEIN: May I have the last answer read, sir? I missed it in my haste.

JUDGE CONSTANTINE: All right. Please read it back, Mr. Reporter.

(Whereupon, the Reporter read back the pending question.)

JUDGE CONSTANTINE: I'll overrule the objection on the ground that no conversation got in, only the fact that they were engaging in union activity. I think they may show that.

All right, go ahead, Mr. Sheridan.

Q (By Mr. Sheridan) All right. Just to back up -- the following day, which would be August 24th, what, if anything, did you do at the warehouse?

A I talked first to Jim Houck and following that to two other employees and discussed with them whether or not they would be interested in being represented by a union.

JUDGE CONSTANTINE: I don't want the details of that. The fact that he engaged in activities is admissible. It isn't necessary to go into the particular employees. I want to make it clear that -- I'm going to let his answer stand, but don't go into details. The fact that he engaged in union activity is admissible, and he can say that I

talked to employees but it isn't necessary to go into details or to mention their names.

All right, go ahead.

Q (By Mr. Sheridan) Was it decided which union you would want to represent you?

A Yes. We decided we wanted Teamsters Local 294 to represent us.

Q All right. Now I'll direct your attention to on or about August 29th of 1973. What, if any, actions were taken towards getting a union?

A On August 29th I had requested Jim Touck to call the Union Hall and set up a meeting between us and representatives of the Union, to inform them that we wanted them to represent us.

Q Was such a meeting set up?

A Yes, it was.

Q Was it that evening?

A Yes, it was. I believe around 7:00 that evening.

Q And were you at that meeting?

A Yes, I was.

Q And about how many other employees were there?

A There were a total of 19 employees, including myself.

Q Were there any Union representatives present?

A Mr. Mike Robilatto, a Business Agent, and Bill Germain, a Business Agent.

Q And where was the meeting held?

A Right off the main lobby in the main meeting room of the Union Hall.

Q Now who did the talking for the Union?

A Mr. Mike Robilatto.

Q Could you state what was said by him and what, if anything, was said by the employees?

MR. BOOKSTEIN: I object on the ground of hearsay.

JUDGE CONSTANTINE: All right, I'll sustain the objection. The fact that they engage in union activities, yes, but what goes on at union meetings is not admissible. That's hearsay.

MR. SHERIDAN: Your Honor, this is very relevant to the case.

JUDGE CONSTANTINE: I don't care whether it is or not. I'm going by the rules of evidence. What goes on at union meetings, unless there is an employer present, is not admissible. All you can do is to show that they engage in union activity; that they did discuss the question of union representation. That's in evidence, but the details I'm not going into. I want to make it clear that the objection is well taken.

Q (By Mr. Sheridan) What, if any, action was taken at this meeting towards getting a union representative?

A Those men at the meeting signed cards to request

representation.

JUDGE CONSTANTINE: Did all 19 sign -- I'm trying to make it short.

THE WITNESS: To the best of my knowledge, yes, sir.

JUDGE CONSTANTINE: Okay.

Q (By Mr. Sheridan) Now what, if anything, was said by the Union representative with regards to the cards?

MR. BOOKSTEIN: I object to anything that was said by the Union representative at a time when no employer representative was present.

JUDGE CONSTANTINE: Well, now, wait a minute. Do you contend that the cards were improperly obtained? If you do, then I'm going to find out what he said. If you don't, then I'll take the cards and I won't. The Board has ruled that when there is a contention that the cards were improperly obtained, that the General Counsel may show that they were properly obtained. The only way to show that is by the conduct and the conversation. I'll have to ask you, do you contend they were improperly obtained?

MR. BOOKSTEIN: We do not contend that the 19 cards which were said to have been obtained the evening of August 29 were improperly obtained.

JUDGE CONSTANTINE: All right, then, I'll sustain the objection. There is no objection -- I mean there is no contention they were improperly obtained, therefore, the

objection is well taken.

MR. SHERIDAN: Would you mark this for identification, please, as General Counsel's Exhibit 2 --

JUDGE CONSTANTINE: Is that one card?

MR. SHERIDAN: Yes, sir.

JUDGE CONSTANTINE: Why don't you put in all 19? They say that there is no objection that they were improperly obtained. Make it 2(a) to 2 whatever 19 comes to.

MR. BOOKSTEIN: We would have no objection to that offer.

JUDGE CONSTANTINE: I assumed so, but don't ask me what 19 is. I said 2(a) to something -- (m) is 13 so go on from there -- I learned that in grammar school.

MR. SHERIDAN: Do I understand that there is no objection to the introduction of these 19 cards in evidence?

JUDGE CONSTANTINE: Yes. And if there is, I'm going to admit them anyway because there is nothing to show that they were improperly obtained. What does it come to -- 2(a) through what -- I want it for my notes.

MR. SHERIDAN: 2(a) -- may we go off the record for a second?

JUDGE CONSTANTINE: All right, off the record.

(Discussion off the record.)

JUDGE CONSTANTINE: On the record. 2(a) through 2(s).

MR. BOOKSTEIN: No Board or no GC?

JUDGE CONSTANTINE: GC.

MR. SHERIDAN: General Counsel's exhibit, yes.

(The document above-referred to was marked General Counsel's Exhibit 2(a) thru 2(s) for identification.)

MR. SHERIDAN: I'd like to give copies to the parties of the cards.

JUDGE CONSTANTINE: Go ahead -- who's stopping you. Incidentally, Mr. Pozefsky is a party, you give him copies, too.

MR. POZEFSKY: He already gave me mine.

JUDGE CONSTANTINE: Can't you do that during the recess rather than lose time now?

MR. SHERIDAN: I don't care but I thought Mr. Bookstein might want a copy of it.

MR. BOOKSTEIN: I can wait until the recess.

JUDGE CONSTANTINE: The recess at 2:30?

MR. BOOKSTEIN: Yes.

(The document, heretofore marked General Counsel's Exhibit Nos. 2(a) thru 2(s), was received in evidence.)

JUDGE CONSTANTINE: Please proceed, Mr. Sheridan. I think we're making some progress.

Q (By Mr. Sheridan) All right, at the end of that meeting, Mr. Dillenbeck, what, if anything else, did you do?

A I took blank cards with me and brought them in the

warehouse the following day.

Q And what, if anything, did you do with those cards?

A Throughout the day I requested of other employees if they wished to be represented by a union that they sign those cards.

JUDGE CONSTANTINE: When you say "throughout the day," I'm assuming it's the next day, August 30th?

THE WITNESS: Throughout the next day.

JUDGE CONSTANTINE: I just want to make my record -- my notes clear.

Q (By Mr. Sheridan) How many days was it, Mr. Dillenbeck, after the meeting?

A After the meeting, it was probably three days that we were asking about the card signing.

JUDGE CONSTANTINE: Oh, I thought it was August 30th.

THE WITNESS: No.

JUDGE CONSTANTINE: No. All right.

Q (By Mr. Sheridan) So, over the next three days?

A Right.

Q And what, if anything, did you say to the employees when you gave them the cards?

MR. BOOKSTEIN: Well, I object to that.

JUDGE CONSTANTINE: The Board has said it's admissible unless you contend that there is nothing improper in his obtaining their signatures.

MR. BOOKSTEIN: I cannot make that concession.

JUDGE CONSTANTINE: All right, then, he's entitled to show that -- how they were obtained.

Q (By Mr. Sheridan) What, if anything, did you say to the employees?

JUDGE CONSTANTINE: Only those who signed. I'm not interested in those who didn't sign.

With respect to those who signed, what kind of language did you use?

MR. BOOKSTEIN: May I also urge in this connection, Mr. Examiner, that no proper foundation is laid. In other words, if he's going to be permitted to testify to this, I believe he should be asked, first, where the conversation took place and with whom and in the presence of whom, so that I --

JUDGE CONSTANTINE: If he used the same language with respect to all of them, I'll take it. Did you use the same language --

MR. BOOKSTEIN: That has not been testified to.

JUDGE CONSTANTINE: Well, I'll ask him. I'm trying to avoid unnecessary details.

I'm not saying you have to say "yes" or "no" to this. I want you to tell the truth, you're under oath. Did you use the same language, or about the same language, in soliciting employees to sign the cards which Mr. Sheridan

is going to show you in a minute?

THE WITNESS: Yes, I did, basically.

JUDGE CONSTANTINE: All right. Now ask him what that language was.

Q (By Mr. Sheridan) What did you say, Mr. Dillenbeck?

A I asked them if they wished to be represented by the Union; if they did they would have to sign these cards and return them to me so that I could turn them back in to the Union.

MR. SHERIDAN: Would you mark this for identification, please, as General Counsel's Exhibit 2(t).

JUDGE CONSTANTINE: If those are going beyond (z), why don't you make it a new group -- 3(a) through what -- just so you won't have to use (aa) and (bb) and so forth. Will it go beyond (z)?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: All right. It's just a suggestion on my part. Make it 3(a).

MR. SHERIDAN: Make it 3(a) instead of 3(t).

JUDGE CONSTANTINE: It's 3(a) through what? You can deal with them as a group. He said he used the same language, so you can deal with them as a group.

MR. SHERIDAN: General Counsel's 3(a) for identification.

JUDGE CONSTANTINE: All right, 3(a) through what?

MR. SHERIDAN: 3(a) through 3(h).

JUDGE CONSTANTINE: 3(h), all right. Show them to the witness as a group. Later on he can mark those for identification. Let's proceed with the witness. Show them to him as a group and ask him if those are the ones which he solicited, which he claims, at the warehouse. I'm not saying they are.

Q (By Mr. Sheridan) Mr. Dillenbeck, would you look at Exhibits 3(a) through 3(h), each one of them, and I ask if those are the cards that you solicited in the manner that you described?

(Witness examines documents.)

THE WITNESS: I was present at the soliciting of this one.

Q (By Mr. Sheridan) When you say "this one," whose card?

A John Biernik.

JUDGE CONSTANTINE: Did you hear what was said?

THE WITNESS: Yes, I did.

JUDGE CONSTANTINE: Was it any different than what you described a minute ago?

THE WITNESS: No, sir, it was not.

JUDGE CONSTANTINE: All right.

THE WITNESS: I was also present with Harry Cone. Mr. Cone was given a card blank. He took it down the aisle by himself, signed it, and brought it back to us signed some

fifteen minutes later. Thomas Merwitz, I gave him his card at a coffee break. He filled it out in front of me and returned it to me signed and filled out. William Savage came to me and requested a card, with the words, "I hear you fellas are starting a union and I'd like to join it. Can I have a card?" Mr. Savage took the card, filled it out and returned it to me, in front of me.

JUDGE CONSTANTINE: Well, I assume you used the same language. Now, first, take out those cards which were signed in front of you and mention them by name.

THE WITNESS: All right. Ira Stockwell.

JUDGE CONSTANTINE: All right, he signed in front of you. Go ahead, are there anymore?

THE WITNESS: Joseph Butler signed in front of me.

JUDGE CONSTANTINE: All right.

THE WITNESS: William Vohnoutka signed in front of me. Don Johnson took the card with him. I believe it was given to him by Jim Houck. He took it with him and brought it back -- returned it to Jim Houck signed, and Jim Houck returned it to me.

JUDGE CONSTANTINE: All right, that takes care of 3(a) through 3(h).

(The documents above-referred to were marked General Counsel's Exhibit Nos. 3(a) thru 3(h) for identification.)

Q (By Mr. Sheridan) Now going back to the card signed by

Mr. Butler. Do you recall which date that was signed? There is no date on this.

A It was a Saturday morning.

MR. BOOKSTEIN: Mr. who?

MR. SHERIDAN: Butler.

THE WITNESS: It was definitely a Saturday morning.

JUDGE CONSTANTINE: Do you know about what month it was?

THE WITNESS: It was a Saturday prior to September 4th.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) Now I'll show you Mr. Stockwell's card. Is that the way he gave it back to you?

A Yes, sir.

Q As it appears there?

A Yes, sir.

MR. BOOKSTEIN: May I see that?

(Document shown to Counsel.)

MR. SHERIDAN: I offer in evidence Board's Exhibits -- excuse me -- General Counsel's Exhibit 3(a) thru 3(h).

MR. BOOKSTEIN: May I see them, Mr. Sheridan?

(Documents shown to Counsel.)

MR. BOOKSTEIN: May we go off the record for a moment?

JUDGE CONSTANTINE: Off the record.

(Discuss off the record.)

JUDGE CONSTANTINE: On the record. Are you ready, Mr.

Bookstein?

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: I assume you're offering those?

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: Any objection?

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: In the absence of objections, they will be received. Please mark them received, Mr. Reporter.

(The document, heretofore marked General Counsel's Exhibit No. 3(a) thru 3(h), was received in evidence.)

Q (By Mr. Sheridan) Do you know whether or not you were the only one who obtained signed cards in the warehouse?

A No, I was not.

Q What, if anything, was done with the cards that you signed -- or that you had signed and the cards that others had signed, to your knowledge?

A All of the cards that were signed were turned over either to myself or to Jim Houck. We took them to the Union Hall and turned them over to the girl in the office that was there.

Q Now I direct your attention to on or about September 4th. Did you place a phone call to Mr. Nick Robilatto?

A Yes, I did.

Q And who is Mr. Robilatto?

A Mr. Robilatto is the president of Local 294.

Q And what was your conversation with him?

MR. BOOKSTEIN: I object to that.

JUDGE CONSTANTINE: I sustain the objection.

Q (By Mr. Sheridan) As a result of your conversation with Mr. Robilatto, what, if anything, happened?

A Mr. Robilatto came to the warehouse --

Q Was that the same day?

A Yes, sir.

Q About what time?

A About 20 minutes after I called him.

Q And what happened when he got there?

A He sent a man down to me. I went up front and met him -- I had never met him before. I explained to him that we wanted him to talk to our employer, to explain to our employer that we wanted representation, and he agreed to do so. We went in and we requested a meeting with Mr. Isadore Tabachneck.

JUDGE CONSTANTINE: Who is that?

THE WITNESS: Mr. Isadore Tabachneck.

Q (By Mr. Sheridan) And who is Mr. Isadore Tabachneck?

A He is, to my knowledge, the president of the Trading Port.

Q And where was this meeting held?

A In the lower office conference room.

Q And who was present?

A Myself, Mr. Isadore Tabachneck, and Mr. Mike Robilatto.

Q And who did the talking in the meeting?

A Mr. Nick Robilatto and Mr. Tabachneck.

Q And just what was said?

A Mr. Robilatto told Mr. Tabachneck that he had 43 men who were wishing representation, that he had 43 signed cards from these men. He reminded Mr. Tabachneck of an incident, that I was not present for, that a couple of years previously he had met with Mr. Tabachneck on the same thing. He stated that Mr. Tabachneck had told him at that time that he accept signed cards from the men if he got a majority for unicn representation. Mr. Tabachneck said that he didn't see any signed cards. Mr. Robilatto said that he would not show them to Mr. Tabachneck, that he would show them to a State mediator and turn them over to him and let him handle the matter if Mr. Tabachneck wished. Mr. Tabachneck said, no, that he had his rights to do things the American way, I believe he said, and that he had a right to call for an election with the National Labor Relations Board, and that he would contact his attorney the next day and petition for this election with the National Labor Relations Board.

Q All right. Now, at that time, how many employees had signed cards, to your knowledge?

A 43.

Q Do you know how many employees were in the warehouse,

approximately?

A Approximately 49.

JUDGE CONSTANTINE: Do we have to take evidence on that? Can we agree on roughly how many there were.

MR. BOOKSTEIN: Approximately correct.

JUDGE CONSTANTINE: 49?

MR. BOOKSTEIN: Approximately correct.

JUDGE CONSTANTINE: In the unit?

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: Is there any question as to the propriety of the unit?

MR. BOOKSTEIN: None. The Answer lists the allegations of the Complaint.

JUDGE CONSTANTINE: I haven't seen the Answer. Okay, then, we don't have to go into that.

Q (By Mr. Sheridan) Now, I direct your attention --

JUDGE CONSTANTINE: I might say, at the risk of being wrong mathematically, I guess 43 is a majority, I could be wrong. I wasn't that good in mathematics in high school or college.

MR. BOOKSTEIN: I would always like to be that right, Mr. Examiner.

Q (By Mr. Sheridan) All right, Mr. Dillenbeck, I direct your attention to on or about September the 5th --

JUDGE CONSTANTINE: September?

MR. SHERIDAN: 5th.

JUDGE CONSTANTINE: Thank you.

MR. SHERIDAN: 1973.

JUDGE CONSTANTINE: May I say that from now on dates will be '73 unless you mention otherwise?

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: All right, that'll save the necessity of mentioning the year.

Q (By Mr. Sheridan) Did you attend a meeting at the warehouse that day, Mr. Dillenbeck?

A Yes, sir, I did.

Q And where was it held?

A At the front main desk of the warehouse.

Q And who was there?

A Mr. Sam Tabachneck was directing the meeting.

Q And who is Mr. Sam Tabachneck?

JUDGE CONSTANTINE: He just said who he is. You don't have to have it again.

MR. SHERIDAN: This is another one, your Honor.

JUDGE CONSTANTINE: It is?

MR. SHERIDAN: The other one was Isadore Tabachneck.

JUDGE CONSTANTINE: Oh, this is another Tabachneck.

THE WITNESS: I believe Mr. Sam Tabachneck is the vice president.

Q (By Mr. Sheridan) And you say Mr. Tabachneck was there.

Who else was there?

A Mr. Isadore Tabachneck, Mr. Avrum Tabachneck.

Q Who is Avrum Tabachneck?

A That's Mr. Sam Tabachneck's son, and to the best of my information now, he is now Personnel Director.

Q Who else was there?

A And brought out the employees from the office --

JUDGE CONSTANTINE: No, no. The question is, who else was there?

MR. SHERIDAN: Yes, that's what he's --

JUDGE CONSTANTINE: The employees?

THE WITNESS: The office employees.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) The office employees were there?

A Right.

Q And who else?

A Mr. Brunelle, Walter Snyder, William Smith -- there's another buyer -- I believe this gentleman was there -- I'm not quite certain of his last name. There were 38 to 40 of the warehouse employees that was there.

Q All right. Now who spoke at this meeting?

A Primarily, Mr. Sam Tabachneck.

Q What did he say?

A He said that he understood we were attempting to form a union. He felt that we were only hurting the company by

doing so, and raising his arms to the office -- toward the office employees he said, these were the people -- the innocent people who we were going to hurt by our actions, that by our actions losses of customers who could not be replaced because possibly the company would go out of business, all of us could lose our jobs. He felt that we could resolve it in other ways, and would we please give it much thought in that respect and use our own best judgement as to what we did about it.

Q Now, that same day, September 5th, at about 3:00 p.m., were you approached by anybody?

A By Mr. Walter Snyder.

Q And who is Mr. Snyder, to your knowledge?

A To the best of my knowledge, he is an office manager.

Q And where did he approach you?

A In the warehouse, down on the railroad receiving dock.

MR. BOOKSTEIN: I'd like to, if I may, object, for the record, to the witness's answer, that Mr. Walter Snyder is an office manager. I think it's nothing but a conclusion on the witness's part in the characterization, and there is no factual basis stated in this record for that conclusion by the witness.

JUDGE CONSTANTINE: That's a matter of cross examination. If he says that's it, that's his opinion. You may show that it is not founded properly.

MR. BOOKSTEIN: My objection, Mr. Examiner, is that it is not properly a matter of opinion testimony.

JUDGE CONSTANTINE: All right. That's a matter to be brought out on cross examination. I'll overrule the objection.

Q (By Mr. Sheridan) What happened when Mr. Snyder approached you?

A Mr. Snyder approached me and asked me --

JUDGE CONSTANTINE: Wait a minute, wait a minute. I think that this is serious enough so that you may on voir dire establish whether he knew or did not know, unless the Answer admits Walter Snyder is an office manager, because I believe --

MR. BOOKSTEIN: Well, the Answer denies that.

JUDGE CONSTANTINE: All right -- because if the man doesn't have any authority, there is no point in going into what he said to this man. So I'm going -- you may take voir dire now and try to establish, if you can, whether this man properly knows Mr. Snyder is -- his position.

MR. SHERIDAN: Your Honor, I prefer to do that myself on direct examination, if that's --

JUDGE CONSTANTINE: Well, all right, go ahead, but ask him how he knows if Walter Snyder -- I didn't know you were going into it.

Q (By Mr. Sheridan) What do you know about Mr. Snyder as

to what he does, where he works, and this sort of thing?

JUDGE CONSTANTINE: And did anybody from the front office tell you what his position was?

THE WITNESS: No, sir, no one from the front office told me what his position was. I know Mr. Snyder personally outside the warehouse, and I have seen Mr. Snyder, during the course of my duties which took me into the office frequently, I have seen Mr. Snyder give orders to the girls in the office which were followed.

Q (By Mr. Sheridan) How many girls?

A There are approximately -- I think three girls worked right in the same room with Mr. Snyder.

Q And what room is this?

A Primarily the computer room.

Q And where is this located in the warehouse?

A At that time it was located in the front of the office near the main desk.

JUDGE CONSTANTINE: I think you've made a prima facie case. It's up to them to destroy it when they come to put on their case or on cross examination, so I'll take the conversation subject -- I want to make it clear -- subject to motion to strike after you've cross examined, and then subject to another motion to strike after you have put on evidence as to Mr. Snyder's actual duties.

MR. BOOKSTEIN: Very good.

JUDGE CONSTANTINE: I think he's made a prima facie case.

MR. BOOKSTEIN: I would like the record to show that I respectfully except with that ruling. I do not believe the proper foundation has yet been laid to show Mr. Snyder's status as office manager.

JUDGE CONSTANTINE: All right. I think they have; but you don't have to except my rulings, you get an automatic exception.

MR. BOOKSTEIN: I forgot we had no jury, sir.

Q (By Mr. Sheridan) All right, now, Mr. Dillenbeck, would you relate what happened when Mr. Snyder approached you?

A Mr. Snyder asked me if I would have coffee with him and talk with him.

JUDGE CONSTANTINE: Forget that. Just the conversation.

THE WITNESS: We went upstairs --

JUDGE CONSTANTINE: You may have discussed the World Series, too, I'm not interested in that.

MR. SHERIDAN: Well, this is important, your Honor. Preliminaries are important in this particular instance.

JUDGE CONSTANTINE: Maybe so but I'm ruling they're not. I just want to know if Snyder said anything which is prohibited by the Act, or if not prohibited, indicates anti-union animosity. That's all I'm interested in.

MR. BOOKSTEIN: I wonder, Mr. Examiner, too, if we

aren't entitled to know, prior to the witness relating the purported conversation, whether there was anyone else present.

JUDGE CONSTANTINE: That's something you can bring out on cross examination.

Q (By Mr. Sheridan) Was anyone else present, Mr. Dillenbeck --

JUDGE CONSTANTINE: It's up to him to decide how he prefers to use evidence.

Q (By Mr. Sheridan) And where did you talk?

A Upstairs in the coffee room.

Q And what did Mr. Snyder say?

A Mr. Snyder stated to me, he said, "Jimmy, we've been friends for a long time. I've been talking to Sam about this --

Q Sam who?

A Sam Tabachneck he referred to.

Q Did he say he did talk to anybody else?

A Sam, primarily, he would refer to.

Q Okay.

A And he said, "I really feel that what you're doing is going to hurt you and it's going to hurt me and it's going to hurt the warehouse," and he said, "I think I can talk to Sam about returning sick pay, possibly giving you a raise, possibly getting you extended vacation benefits, and getting

rid of the warehouse manager, Mr. Robert Solomon." My reply to this was that, first of all, I didn't object to Mr. Solomon in any way, that I'd gotten along with him quite well for a good number of years; he liked me personally, aside from being my boss in the warehouse. I told him that I could fairly deal with him as a boss on most occasions, and that I felt if he was a hard boss in any way it was not his fault, he was an employee of the company, also, and followed orders from people higher than him. I told him that I would not accept any promises of benefits as I had for many years been promised benefits, been given benefits, and had benefits taken away from me, and, furthermore, my benefits were in the contract. His reply to that was that possibly Mr. Tabachneck would put it in writing. My reply was that I would not accept that; I would prefer to have a union than have it in a contract. He also offered, would I accept a representative from -- for the employees who could deal directly with Mr. Tabachnecks -- all of the Mr. Tabachnecks in the office as a representative of the employees -- in his words, "a sort of a company union type of thing."

Q Now when Mr. Snyder outlined these matters, what, if anything did he say you had to do in order to get them?

A Forget about the union.

Q Now I'll direct your attention to on or about September

the 6th. Were you approached by Mr. William Brunelle?

A Yes, I was.

Q And what time was this, approximately?

A It was in the afternoon, after lunch -- 2:00 o'clock perhaps, something like that.

Q And where did he approach you?

A Down on the railroad dock, also.

Q What were you doing at the time?

A I was putting away stock with a forklift machine.

Q And was anyone else present during the conversation?

A There were other men there but they went away when they realized I was going to talk to Luke.

Q You say "Luke" --

A That's his nickname -- Mr. William Brunelle.

Q Okay. And what was the conversation? What did he say to you and what did you say to him --

MR. BOOKSTEIN: Mr. Examiner, I object to this conversation unless there is, first, showing that Mr. Brunelle had any supervisory status with the Respondent.

JUDGE CONSTANTINE: What does the Complaint say, that he's what?

MR. SHERIDAN: Well, it says he's "buyer and warehouse manager."

JUDGE CONSTANTINE: And the Answer admits that?

MR. SHERIDAN: It did at one time but now it apparently

doesn't.

MR. BOOKSTEIN: It denies it.

JUDGE CONSTANTINE: But he says at one time your Answer did admit it.

MR. BOOKSTEIN: That's correct.

JUDGE CONSTANTINE: Well, it's a declaration against interest whether you withdraw that answer or not. What you put in the Pleading can be used against you whether you withdraw the Pleading or not.

MR. BOOKSTEIN: I don't question that it bears on the weight, but I do say, Mr. Examiner, that the issue is posed now by the Pleadings as reframed, and the amended Answer denies that Brunelle had supervisory status, at least at the time of the conversation that Mr. Sheridan is seeking now to elicit.

JUDGE CONSTANTINE: I'm going by the original Pleading. As I said, that goes to the weight, not to the admissibility. If you at one time or another admitted that he was a supervisory, that's a declaration against --

MR. BOOKSTEIN: I would like to point something out, if I may, Mr. Examiner -- not to argue with your ruling but perhaps to make my position clear to you for a clear ruling.

JUDGE CONSTANTINE: My ruling is fairly clear. I'm admitting it.

MR. BOOKSTEIN: Perhaps the Examiner would reconsider

his ruling if he would hear me for just a moment.

JUDGE CONSTANTINE: Go ahead.

MR. BOOKSTEIN: The Answer -- I'm sorry -- the Complaint, Paragraph 5, makes a dual allegation with respect to Mr. Brunelle, namely, that he was "Respondent buyer and warehouse manager."

JUDGE CONSTANTINE: Does it also say he's a supervisor? I haven't got the Complaint before me.

MR. BOOKSTEIN: In the preamble to this -- these tabulations of names and statuses, it does make the allegation that he's a supervisor.

JUDGE CONSTANTINE: Is the preamble denied in the original Answer -- not as amended? As I said, if it isn't denied, it's a declaration against interest.

MR. BOOKSTEIN: It is not, and it's my oversight.

JUDGE CONSTANTINE: All right. Well, you can bring that out when you can argue the case. I have to go by the rules of evidence. I think it's more a matter attributable to the weight of the evidence rather than its admissibility, or at least that's what I learned in law school. I know the law has changed since I went to law school.

Go ahead.

Q (By Mr. Sheridan) All right, would you relate the conversation, Mr. Dillenbeck?

A The conversation with Mr. Brunelle was basically the

same as it was with Mr. Snyder. He made the same offers —

Q What did he say? You have to say what he said.

JUDGE CONSTANTINE: He doesn't have to unless you think I can't follow him. My notes show what about what Mr. Snyder said. You say it was about the same thing?

THE WITNESS: Absolutely, just about the same thing.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) He made the same offers to you?

A Yes, he did.

Q And what would you have to do in order to get —

A Under the same condition, that we forget about the union.

Q And what, if anything, did you respond to that?

A I responded the same as I did to Mr. Snyder, that I would not accept anybody's word for my benefits or would I accept a piece of paper that had no guarantees, that I want a contract, I want union representation.

Q Now I'll direct your attention to Saturday, September the 8th. Was there a meeting at the Union Hall that day?

A Yes, there was.

Q What time was the meeting?

A I think about 10:00 o'clock at night.

Q Were there any employees of the Trading Port there?

A Yes, there were.

Q About how many?

A 39.

Q Were you there?

A Yes, I was.

Q Was there any union representatives during the meeting?

A Not during the meeting, no.

Q All right. Would you relate what happened at this meeting?

A At this meeting, myself and John Robinson --

Q Who is John Robinson?

A Another employee at the time at the Trading Port, Incorporation, and still is. John Robinson and myself more or less were the directors of the meeting -- if you call it that, I don't know -- and before the meeting started, Mr. Nick Robilatto came in at our request, and we were at the time discussing the possibilities of striking the company. I had explained to the employees that on the 4th of September Mr. Isadore Tabachneck had said that he was going to petition for an election, and to the best of our knowledge he had not done so at this point, that it did not look to us as if he were going to. We called Mr. Robilatto in to ask his advice upon this matter. He told us that he could not give us advice on this matter, except that he would like to see us not strike the company. He would like to see us--

MR. BOOKSTEIN: I object. He's gone beyond what the question called for.

JUDGE CONSTANTINE: All right, I'll sustain the objection. He's done more than go beyond the question. Its -- your other objection, which is -- if that it's hearsay, I'll sustain it on both grounds.

MR. BOOKSTEIN: I couldn't find it in the question that was originally asked but I find it now.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Well, your Honor, I would say that this is very material, unless Mr. Bookstein would agree to stipulate that the strike, on its conception, was at the Labor Board to strike. Obviously the reason why they struck is pertinent to this case.

JUDGE CONSTANTINE: There's no evidence that they struck. You first take --

MR. SHERIDAN: Well, you don't have a strike until --

JUDGE CONSTANTINE: Well, I'm going to sustain the objection unless there's an employer representative present.

MR. SHERIDAN: You understand, your Honor, what this meeting is about?

JUDGE CONSTANTINE: No, I don't, and I don't care, because there was no employer representative present.

MR. SHERIDAN: We're talking here, your Honor, about a meeting which preceded a strike.

JUDGE CONSTANTINE: We better establish the strike first and then ask him if he knows what the strike was about.

I'm no mind reader. There's nothing before me that there's a strike.

Q (By Mr. Sheridan) Did there come a time when there was a strike, Mr. Dillenbeck?

A Yes, sir.

Q And when was that?

A At midnight on September 9th.

Q And what was the strike about?

MR. BOOKSTEIN: Well, I object to that, Mr. Examiner.

JUDGE CONSTANTINE: If he knows

MR. BOOKSTEIN: That, I think, is something that is for you to ultimately conclude. I don't think it's for any witness to --

JUDGE CONSTANTINE: All right. Let me ask some questions -- subject to objections by all three of you gentlemen here. Was a strike vote taken?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right. Were you present when the strike vote was taken?

THE WITNESS: Yes, sir, I was.

JUDGE CONSTANTINE: Do you know what the strike was about -- at that strike vote, nowhere else?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: What was it about?

THE WITNESS: About --

MR. BOOKSTEIN: I object to the question by yourself now.

JUDGE CONSTANTINE: All right, then, I'll let Mr. Sheridan ask it. I don't want to.

MR. BOOKSTEIN: I don't mean it as to who is asking. I just don't think it's a proper question.

JUDGE CONSTANTINE: If there is a strike vote, I'll take evidence as to what it was about.

Go ahead, you ask it.

Q (By Mr. Sheridan) Was this strike vote at that September 8th meeting that you were testifying about?

A Yes, sir, it was.

Q All right. Before the strike vote was taken, was there a discussion as to why you were going on strike?

MR. BOOKSTEIN: This I object to as being --

JUDGE CONSTANTINE: The discussion I will not allow. I will allow him to say whether he knows what the strike vote was.

Q (By Mr. Sheridan) Do you know why the employees voted to go on strike at that meeting?

MR. BOOKSTEIN: I object to that as improper and I think it's already been ruled upon.

JUDGE CONSTANTINE: I'm going to allow him to describe what the strike vote was about.

MR. BOOKSTEIN: That was not the question. I have no

objection to that question.

JUDGE CONSTANTINE: All right, then, rephrase your question.

Q (By Mr. Sheridan) What was the strike vote about, Mr. Dillenbeck?

MR. BOOKSTEIN: I object to that question. That is not the question that you, Mr. Examiner, said was proper. It's a question you've ruled improper, and Mr. Sheridan is persisting in trying to get in an answer to an improper question.

JUDGE CONSTANTINE: All right, I'm going to allow him to ask what the strike vote was about -- if you know, now -- wait a minute, I want to make it clear, and I don't want you to say something just to please Mr. Sheridan. I want you to tell the truth. Do you know what the strike vote was about?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: You were there when they took the vote?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: Are you asking for figures, sir?

JUDGE CONSTANTINE: I'm not asking for anything.

MR. BOOKSTEIN: Because I have no objection to figures.

JUDGE CONSTANTINE: If he knows what they struck for,

what the purpose was, he may say so.

The next question is, how many were for and how many were against; if you want to establish that through Mr. Sheridan or on cross examination.

MR. BOOKSTEIN: The point of my objection, so there may be no doubt about it -- I'm not trying to protract this hearing today -- is that it is for you, sir, to conclude what motivated the strike. It is not for this witness to testify to the operation of his mind --

JUDGE CONSTANTINE: No, I don't want his mind. I want to know what was said at that meeting that they were voting for. That's all I want to know -- not what went on in your mind. Did they say why they were striking?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) And what did they say?

A They said they were striking to obtain union representation.

Q And then was there a vote taken?

A Yes, sir.

Q And what was the vote?

A 39 to nothing.

Q For what?

A In favor of a strike.

Q And was there any discussion as to when the strike

would start?

A Yes, there was.

Q And what was the date set for the strike?

A The date set was -- the strike was to start at midnight September 9th.

Q And did it start at that time?

A Yes, it did.

Q Now at the end of the meeting on the 8th, after the vote was taken and the employees voted unanimously to go on strike, was there any discussion with any union representatives about this?

A Yes, there were.

MR. BOOKSTEIN: I object.

JUDGE CONSTANTINE: All right, I'll sustain that objection. What goes on between him and the union, unless it's called for the employer -- unless the employer was present, it is hearsay.

MR. SHERIDAN: I just want to establish -- not the substance of the conversation.

Q (By Mr. Sheridan) Did you have a discussion with any union representative?

JUDGE CONSTANTINE: That question I'll allow. Just answer that "yes" or "no."

MR. BOOKSTEIN: That question I don't object to.

JUDGE CONSTANTINE: No, I didn't think you would.

THE WITNESS: Yes, I did.

Q (By Mr. Sheridan) And who was the union representative?

A Mr. Nick Robilatto.

Q As a result of that discussion with Mr. Robilatto, what, if anything, occurred?

A Mr. Robilatto called Mr. Sam Tabachneck and requested a meeting.

Q And was a meeting held?

A Yes, it was.

Q Was it that same day?

A Yes, it was.

Q Where was it held?

JUDGE CONSTANTINE: When you say "same day," is this September 8th?

MR. SHERIDAN: September 8th.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Is that right, Mr. Dillenbeck?

THE WITNESS: Yes.

Q (By Mr. Sheridan) Where was it held?

A It was held in the conference room -- the lower office of Trading Port, Incorporated.

Q And what time did it start, approximately?

A 2:00 o'clock in the afternoon, I think.

Q And who was at this -- were you at the meeting?

A Yes, sir, I was.

Q And who else was there?

A There was myself, James Houck, another employee; John Robinson, another employee; Mr. Sam Tabachneck, Mr. Izzy Tabachneck, Mr. Navrum Tabachneck --

Q Who is Navrum Tabachneck?

A Mr. Navrum Tabachneck is another brother to Izzy and Sam.

Q And who else was present?

A Mr. Nick Robilatto, Mr. Howard Bennett, a Business Agent for the Union, and, I believe, Mr. Chuck Bentley.

Q Do you recall anyone else who was present for the Company?

A (No response.)

Q Do you recall whether or not Mr. Snyder was there?

A Yes -- I'm sorry -- Mr. Snyder was there at that meeting.

Q Mr. Walter Snyder?

A Right.

MR. BOOKSTEIN: I have no objection to that question, but I do want to state, so the record may be clear, I then object to the coupling of the question before by Mr. Sheridan.

JUDGE CONSTANTINE: I don't understand your objection. What do you mean by the "coupling of the question?"

MR. BOOKSTEIN: When we're through with the evidence, this will remind me of the record -- I need not press it with you now, Mr. Examiner.

JUDGE CONSTANTINE: All right, okay. I would say that in general try not to lead -- that was a very leading question -- practically put the words in his mouth. I am not sure that I could have excluded it because generally leading questions are permissible after the exhaust of the witness's memory. I'm not quite sure that his memory had been exhausted, but it's in now. I'm just saying this for the benefit of all attorneys, please don't lead because when I come to read the record, I don't pay much attention when you put the words in the mouth of the witness. I want you to know that in advance. You may think I'm prejudice, and if you do, you object to the Board, but I want to make it clear that I don't want anyone putting words in the witness's mouth. I want the witness's story.

Q (By Mr. Sheridan) Let me ask you this, Mr. Dillenbeck -- this may be over Mr. Bookstein's --

MR. BOOKSTEIN: Well, I have no objection to who was physically present, which I take it was the real point of Mr. Sheridan's inquiry.

JUDGE CONSTANTINE: Yes. I think there was a reason for that.

Q (By Mr. Sheridan) Who were the -- you've already

testified to the employees and union representative that were present; is that correct?

A Yes, sir.

Q Where did you leave to go down to the warehouse?

A The warehouse representative present?

Q No, no. I mean where -- yourself, the other employees, and the union representatives, where were they just before they went to the warehouse?

A At the Union Hall.

JUDGE CONSTANTINE: All right, that's where we'll stop to adjourn now, gentlemen.

It was agreed in the off-the-record discussion before the hearing started that Counsel for the Respondent has to go to a very important hearing at the Veterans Administration. It was agreed at that time that we would suspend until he returns. I will suspend now until you return, but will you do this much of a favor for us: If around 4:30 you can call, let us know about when you will return because if it looks like you're going to be there the rest of the evening, there's no point in our remaining here for you, but we'll suspend now until you return. I can't tell exactly what time it is.

MR. BOOKSTEIN: I shall endeavor, Mr. Examiner, to call before 4:30. I'd like to give you a reasonable estimate of my return now. I'm grateful to everyone for consenting this.

JUDGE CONSTANTINE: All right. We stand adjourned until we hear from Counsel for the Respondent.

Mr. Witness, you can get up and walk around and talk with people. I'm not going to isolate you, but please don't discuss this case with anybody, not the attorneys, because you're still on the stand, nor any friend.

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: If you do, it can hurt your case.

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right.

(Whereupon, the hearing was adjourned at 2:30 p.m., and reconvened at 4:45 p.m.)

JUDGE CONSTANTINE: On the record. Let's proceed. Will you call back Mr. Dillenbeck, Mr. Sheridan?

MR. SHERIDAN: Yes. Mr. Dillenbeck, please.

JUDGE CONSTANTINE: I assume you haven't finished with him?

MR. SHERIDAN: No.

JUDGE CONSTANTINE: My notes indicate that Mr. Robilatto, accompanied by some employees, spoke to officers of the Respondent on September 8th. Why don't you take over from there.

Q (By Mr. Sheridan) All right. Just to back up a little bit, Mr. Dillenbeck, I believe when we broke you had testified that yourself, the other employees and union represen-

tatives, prior to being at the warehouse, were at the Union Hall; is that correct?

A Yes, sir.

Q Did you proceed from the Union Hall directly to the warehouse?

A Yes, sir, we did.

Q And where did you go from there?

A To the conference room in the lower warehouse office.

Q Who was there when you arrived?

MR. BOOKSTEIN: This is repetitious.

JUDGE CONSTANTINE: It isn't necessary to go into that. Just ask him who was there when they talked, and what did they talk about.

Q (By Mr. Sheridan) Who was there when you arrived?

A Sam Tabachneck, Mr. Izzy Tabachneck, Mr. Avrum Tabachneck, Walter Snyder, Allie -- whose last name, I'm terribly sorry, I do not know -- and a brother-in-law or brother of Allie's, I believe it is.

Q Okay. And who did the talking for the Union and the employees?

JUDGE CONSTANTINE: He's already answered that. He said Mr. Robilatto.

MR. SHERIDAN: Not this meeting. That was the early meeting.

JUDGE CONSTANTINE: Go ahead, who did the talking?

THE WITNESS: Mr. Nick Robilatto.

Q (By Mr. Sheridan) And who did the talking for the company?

A Mr. Sam Tabachneck.

JUDGE CONSTANTINE: This is all in my notes. Now let's not lose any more time.

Q (By Mr. Sheridan) What did he say?

A Mr. Robilatto once again requested from Mr. Sam Tabachneck if he would accept a State mediator to set up a reasonably fast election for us to have union representation. Mr. Tabachneck still insisted he wanted an NLRB election. Mr. Robilatto -- I don't remember informing him that we had voted to strike, but he did mention other alternatives, at which time I think Mr. Sam Tabachneck commented on the fact that a strike would harm the company very much. There was a lot of back and forth discussion between them in this particular line of whether we would -- not willing to strike, that it would harm the company if we did strike, and things of that nature. Mr. Sam Tabachneck said at that point, I believe, that if we went on strike, that he would apply the following Monday morning for -- he would petition for an election with the National Labor Relations Board.

Q Did the company on Monday, or any time, petition the National Labor Relations Board?

A Not to my knowledge, no, sir.

Q I believe you already have testified that the strike did start on September 9th at midnight; is that correct?

A Yes, sir.

Q And did the strikers carry picket signs?

A Yes, we did.

Q And what did the sign say?

A Employees of Trading Port, Incorporated on strike for better wages and benefits, Local 294, Teamsters representation -- something of that nature.

Q Now was there any -- were there any arrangements made as to when the employees would picket?

A We tried to keep it at six men up on four hour shifts.

Q And what was your shift?

A My shift was supposed to be --

JUDGE CONSTANTINE: Is this an issue in the case, as to when they picketed?

MR. SHERIDAN: Well, this --

JUDGE CONSTANTINE: Let's not go into that.

MR. SHERIDAN: It's pertinent in terms of -- your Honor, I think you'll see, when I start questioning him, that this is pertinent, when he was on the picket line, it's very pertinent.

JUDGE CONSTANTINE: Well, then, him. I don't care about the others. Just ask him when he was on. I don't see its pertinence but I'm going to allow it subject to a motion

to strike.

Q (By Mr. Sheridan) When were you on the picket line, Mr. Dillenbeck?

A My shift was 4:00 to 8:00 in the morning, but I was normally there past the noon hour -- sometimes from midnight to past the noon hour.

Q And how long did the strike last?

A For three weeks.

Q And during the course of the strike, how many of the employees who signed cards picketed?

A All but one.

Q Who was the one that didn't?

A Michael Scanlon.

Q Okay. All right, now, during the course of the strike, did there come a time when any employees returned to work?

A Yes.

Q And do you remember when?

A During the second week of the strike, I believe seven employees went back to work, and during the third week three or four more went back to work.

Q Who were the employees who returned?

A Edward Kocienski --

JUDGE CONSTANTINE: Are their names in the Complaint?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: The Complaint designates that some

of them returned to work. I mean if it's admitted in the Answer that some men returned, why take their names -- see, I don't have the Complaint here.

MR. SHERIDAN: No, the Complaint would not deal with the people returning during the strike.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) Edward Kocienski?

A Right. Joe Frank, Don and Thomas Garhartt, Kirk Kvale, Lou Vohnoutka, Doug Martin, Wayne Smith, and Joseph Butler.

JUDGE CONSTANTINE: Is this a matter that's seriously in dispute, Mr. Bookstein?

MR. BOOKSTEIN: I think not, sir.

MR. SHERIDAN: No, I don't believe so.

JUDGE CONSTANTINE: Well, then, why go into it?

MR. SHERIDAN: Well, I think it's pertinent to the case.

JUDGE CONSTANTINE: Oh, everything is pertinent, including the fact that I'm here. Let's go into the real issues.

Q (By Mr. Sheridan) All right. Now, you say that you picketed from 4:00 to 8:00 and sometimes later?

A That's right.

MR. BOOKSTEIN: I don't think that was the witness's testimony. I think he said he was generally there later, perhaps up until noon. He didn't say whether or not he

picketed all that time.

JUDGE CONSTANTINE: Yes.

Q (By Mr. Sheridan) Did you picket?

A Yes, sir, I did.

JUDGE CONSTANTINE: He did say that, at least from 4:00 to 8:00 in the morning.

Q (By Mr. Sheridan) Now, during the time that you were up there and on the picket line -- by the way, how many days did you picket during the strike?

A Every day.

Q Every single day?

A Yes.

Q All right. During the strike, did there ever come a time when Isadore Tabachneck came out to the picket line?

A Yes, sir, every day.

Q Every day, you say. How often?

A At least four or five times a day while I was there.

Q And did he say anything to the pickets?

A He would usually come by at 7:00 o'clock in the morning and --

JUDGE CONSTANTINE: No. The question is, did he say anything to the pickets?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right, now go on to the next question.

Q (By Mr. Sheridan) What did he say?

MR. BOOKSTEIN: I have no objection to that but I think a proper foundation should be laid, Mr. Examiner, by telling us the date and the approximate hour and who was present when he is alleged to have made these statements that the witness is prepared to relate.

JUDGE CONSTANTINE: Well, if this man heard them, that's enough.

MR. BOOKSTEIN: I understand that, but I believe it is also necessary to lay a foundation for a conversation to show the approximate date and time when it occurred, at least to the best of the witness's ability, and who was present when the person is alleged to have made these remarks.

JUDGE CONSTANTINE: He says every day for four or five times a day. I'll accept that statement. I'll overrule the objection. And I'm also overruling it, that it doesn't matter if anyone else was present or not. If he made a -- I'm not saying he made any bad statements, but if he made a bad statement to one employee, that's enough, and this man is an employee.

MR. BOOKSTEIN: I understand that. I don't raise it for that purpose. These are State rules of evidence. In order to get --

JUDGE CONSTANTINE: But the fact is, if he heard it,

that's enough for me. I'm not saying he heard it, now, don't get me wrong.

Go ahead.

Q (By Mr. Sheridan) All right. What did you hear him say on these occasions, Mr. Dillenbeck?

A Mr. Tabachneck would say that we have killed his business, we might as well go home. He was going to Florida to live in a condominium. He was going to put padlocks on the warehouse. We would never come back to work again, and many statements of that same nature.

Q Do you recall any other statements that he specifically made to you and about you?

A He told me I had no seniority anyway; I might as well go home; I was killing his business; the other men, they disliked me, hate me for what I was doing to them.

Q Now, in addition to what you have testified here, when did Mr. Tabachneck come to work in the mornings, approximately?

A Approximately 7:00 a.m. throughout the strike.

Q How would he go in to work?

A He would pass us in a car, stop by the office, get out of the car and go in the office.

Q Now during these times that he came in in the morning, did he say anything to the picket?

A Yes, sir, every morning.

Q What did he say?

A The same things -- you might as well go home; you're wasting your time here; there is no business left; you killed the business; there's no jobs left for you to come back to; padlocks are going on the doors.

Q All right. Now I'll direct your attention to some time the last week of the strike. Do you remember a specific conversation between Mr. Tabachneck and Ira Stockwell?

A Yes, sir.

JUDGE CONSTANTINE: Between whom?

MR. SHERIDAN: Isadore Tabachneck --

JUDGE CONSTANTINE: And the other name?

MR. SHERIDAN: And Ira Stockwell.

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) And who is Mr. Stockwell?

A Mr. Stockwell was a truck driver at the time.

Q Was he one of the picketers?

A Yes, sir.

Q And what was the conversation between Mr. Isadore Tabachneck and Ira Stockwell?

A Mr. Tabachneck started telling Mr. Stockwell he was going to padlock the warehouse, that there was no jobs left for us. Mr. Stockwell told Mr. Tabachneck that he would help him padlock the warehouse. Mr. Tabachneck kept on the same line, and Mr. Stockwell, in order not to get into an

argument with him, turned his back on him and walked away. Mr. Tabachneck stated to Mr. Stockwell that, "That's okay, Ira, I don't have to talk to you, you black son-of-a-bitch. I can talk to these guys over here." He was referring to Jim Houck and Robert Bishop.

Q Is Mr. Stockwell Black?

A No, Mr. Stockwell is White.

Q And I'll direct your attention --

JUDGE CONSTANTINE: Do you contend that that statement -- that one sentence is a violation of the Act?

MR. SHERIDAN: No, it's just --

JUDGE CONSTANTINE: Well, then why bring it out.

MR. SHERIDAN: Because it shows the animus towards these individuals.

MR. BOOKSTEIN: Well, I respectfully disagree.

JUDGE CONSTANTINE: I want to get this thing within due violence, and I don't want any so-called bad statements unless they amount to a violation of law. I'm not here to decide that the man is or is not a racist. I'm only interested in violations of our Act.

All right, go ahead.

Q (By Mr. Sheridan) All right, now I'll direct your attention to --

JUDGE CONSTANTINE: Try to keep this thing within bounds.

Q (By Mr. Sheridan) -- Saturday, September the 29th. Did you attend a meeting at the Union Hall that day?

A Yes, I did.

Q What time was the meeting?

A Shortly after 8:00 o'clock in the morning.

Q And what happened at -- you were at the meeting?

A Yes.

Q What happened at the meeting?

A At the meeting we discussed -- myself and the other strikers discussed what we were accomplishing with the strike, whether or not we were going to win with this tactic or not -- win our representation with this tactic or not, whether or not we should not go back to work and wait for an election -- petition for and wait for an election, and feeling that if we continued to strike, we would either lose more men from the picket lines --

MR. BOOKSTEIN: Well, I object --

JUDGE CONSTANTINE: I'll sustain the objection.

Q (By Mr. Sheridan) Just what was said, Mr. Dillenbeck.

JUDGE CONSTANTINE: Not even what was said. I'll take any vote --

MR. BOOKSTEIN: Just the description of the subject matter, it seems to me, is as far as we have to go with this.

JUDGE CONSTANTINE: Yes. In other words, the general

description is whether they should return to work or not -- now a vote was taken -- okay -- but I'm not going into the details of what goes on at a union meeting.

Again I want to make it clear that it's hearsay unless the employer is present, but the vote is important.

Q (By Mr. Sheridan) Was there a vote taken?

A Yes, sir.

Q And what was the vote?

A The vote was to return to work.

Q Were there any union representatives present at this meeting?

A Mr. Nick Robilatto was present again -- not at the meeting but he was in the other office and called in after the meeting and informed of our decision.

Q All right. And what, if anything, did he do when he was informed of the deicision?

A He went and called Mr. Sam Tabachneck and requested another meeting.

Q And was a meeting held?

A Yes, sir.

Q Was it that same day?

A Yes, it was.

Q About what time?

A I think around 11:00 in the morning.

Q Were you present at the meeting?

A Yes, sir, I was.

Q And who else was present?

A Myself, James Houck, John Robinson, employees; Mr. Nick Robilatto, Mr. Howard Bennett, I believe Mr. Chuck Bentley or William Germain, I'm not sure which one of those two.

Q Who was present for the Company?

A For the Company was Sam, Izzy, and Navrum Tabachneck.

Q Who did the talking for the Union?

A For the Union was Nick Robilatto; for the Company was Mr. Sam Tabachneck.

Q All right, and what was the conversation?

A Mr. Nick Robilatto informed Mr. Tabachneck -- Mr. Sam Tabachneck of our decision to call off the strike and return to work if Mr. Tabachneck would take us back to work according to our seniority.

Q Continue with the conversation. What did Mr. Tabachneck say to this?

A Mr. Tabachneck first alleged that he had no seniority list whatsoever, didn't know anything about seniority. Mr. Izzy Tabachneck then interjected with the fact that I had not the seniority that I thought I had. He had a letter from me that I resigned from the Company.

Q All right, would you explain what he was referring to?

A Yes, sir. In July of 1968, after many months of --

MR. BOOKSTEIN: If I may say so, we do not claim that as a break in Mr. Dillenbeck's so-called seniority.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: There was a technical termination for a reason that had nothing to do with his continued tenure employment.

JUDGE CONSTANTINE: All right, with that assurance, I'll exclude any reference to that. There is no break in his continuance of employment for seniority purposes.

MR. BOOKSTEIN: It had to do with something else entirely.

JUDGE CONSTANTINE: I want to make that clear in the record because -- assuming I find a violation, and this case goes to Court and the Court upholds it, there has to be a back pay hearing and that will depend --

MR. BOOKSTEIN: So there may be no misunderstanding as to our position, Mr. Examiner, I say we do not regard Mr. Dillenbeck's employment tenure with us as broken.

JUDGE CONSTANTINE: All right, that's enough.

MR. BOOKSTEIN: I use the term "seniority."

JUDGE CONSTANTINE: All right, unbroken.

MR. BOOKSTEIN: Correct.

JUDGE CONSTANTINE: But in the ascertaining seniority, if seniority becomes important, I'm not saying it will, the total length of his service will not have been broken, as you

said, his tenure is --

MR. BOOKSTEIN: As for that 1968 incident.

JUDGE CONSTANTINE: All right, go ahead. That's enough on that.

Q (By Mr. Sheridan) All right, would you continue with the conversation?

A Well, after that, Mr. Robilatto and Mr. Sam Tabachneck continued their conversation. Mr. Sam Tabachneck agreed that if there was work he would take us back according to seniority. With that understanding, we left.

Q Were the employees informed of this meeting?

A Yes, sir, they were.

MR. BOOKSTEIN: I object to the witness's statement "With that understanding, we left," because that then goes to his state of mind. I have no objection to his quoting Mr. Sam Tabachneck or saying he left, but I do object to something that is obviously a state of mind.

JUDGE CONSTANTINE: All right, your objection is sustained, but the fact still remains that they did leave and that there was an agreement. That's what I thought he meant by that. My notes show that there was an agreement, that "R" made a proposition and the Company accepted it if there was work.

MR. BOOKSTEIN: The witness has quoted Mr. Sam Tabachneck and has said that they left, and I have no

quarrel with that.

JUDGE CONSTANTINE: Oh, no, he -- you have no quarrel with the statement as to what Tabachneck said.

MR. BOOKSTEIN: I have no quarrel with his having testified to that --

JUDGE CONSTANTINE: Yes, all right, okay.

MR. BOOKSTEIN: -- but I do not concede that's what Mr. Sam Tabachneck said.

JUDGE CONSTANTINE: Then the word "understanding" may be stricken but the rest of it is in the record.

MR. BOOKSTEIN: I have no objection to that.

JUDGE CONSTANTINE: And if I credit the witness -- I'm not saying I will, I haven't heard the case -- I will find that regardless of an understanding there was an agreement that they would be taken back if there was work and according to the seniority.

Q (By Mr. Sheridan) All right. When were the employees to come back?

A We asked Mr. Tabachneck before we left the meeting if we could report to work Monday morning. He said, "If you want to, you can." We then went back to the Union Hall and I informed the employees that they were to report to work at 7:00 o'clock Monday morning, which would be the regular starting time.

Q That would be October 1st?

A Yes, sir.

Q Now, to your knowledge, have there been any further meetings between the Union and the Company?

A Not to my knowledge, no, sir.

Q And have you testified to all the meetings that were ever held between the Union and the Company that you're aware of?

A To the best of my knowledge, yes, sir.

Q All right. Now, on Monday, October 1st, at 7:00 o'clock, did you report for work?

A Yes, sir.

Q And were there any other employees there?

A Roughly, 24 or 25 men were there.

Q And what, if anything, happened when you got there?

A Mr. Isadore Tabachneck was standing in the doorway, outside of the building. I asked him if we could go in there and report for work. He informed me that we could go in in groups of four and speak to Mr. Avrum Tabachneck and he would take care of the situation.

Q Did you go in?

A Yes, sir.

Q And who was with you?

A Myself, Frank Houck, I think Ira Stockwell, Bob Bishop -- I'm not too sure about the fourth man. Myself, Frank Houck, Bob Bishop, definitely, but the fourth man I'm

not absolutely certain of.

Q And what happened when you went in there -- by the way, why was -- was there any particular order the employees went in?

A Well, we went in according to what we felt was our seniority.

Q Were you in the first group?

A I was one of the oldest guys there.

JUDGE CONSTANTINE: I'll allow that in, but I'm not going to be bound by that seniority, seniority by the Company's records and not by what he says.

Q (By Mr. Sheridan) Now what happened when you went in there?

A Mr. Avrum Tabachneck informed us that there was no work for us. He told us that if we wished, to write our names on a yellow legal pad that he had there, our names, addresses, and phone numbers, that he would call us if there was any work. We wrote our names there and requested Mr. Tabachneck if we could have layoff slips so we could apply for unemployment insurance. He directed us to Miss Helen Schenck, who works in the office, and she gave us, I believe, the record -- the Department of Labor slips to get unemployment insurance.

Q Have you ever been called back to work?

A No, sir.

MR. SHERIDAN: Would you mark these for identification, please, as General Counsel's --

JUDGE CONSTANTINE: 4 is the first one.

MR. SHERIDAN: 4.

(The document above-referred to was marked General Counsel's Exhibit No. 4 for identification.)

MR. SHERIDAN: Would you mark this for identification, please, as General Counsel's Exhibit 5.

(The document above-referred to was marked General Counsel's Exhibit No. 5 for identification.)

MR. SHERIDAN: Would you mark this for identification as General Counsel's Exhibit 6.

(The document above-referred to was marked General Counsel's Exhibit No. 6 for identification.)

JUDGE CONSTANTINE: I'd like to point out on the record that there's a young lady here who is the Office Manager of the Albany NLRB Office. I hate to keep her here. Is there some way we can excuse her -- it's after 5:00?

MR. SHERIDAN: No, she can go if she wants to.

JUDGE CONSTANTINE: All right.

(The young lady was excused.)

Q (By Mr. Sheridan) Mr. Dillenbeck, I show you what's been marked for identification as General Counsel's Exhibit

5 and 6, and ask if you received those during the strike?

(Witness examines documents.)

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) Both of them?

A Yes, I received this one.

JUDGE CONSTANTINE: Well, when you say "this one," which one is it?

THE WITNESS: This is the letter of September 13th.

JUDGE CONSTANTINE: What is its identification number?

THE WITNESS: Oh, I'm sorry -- General Counsel's 4.

JUDGE CONSTANTINE: All right, 4.

THE WITNESS: And this one also -- yes, the following weekend, this is --

JUDGE CONSTANTINE: When he says "this one," which one is he referring to now?

THE WITNESS: General Counsel's 5.

JUDGE CONSTANTINE: All right. You received those which are in evidence -- only for identification purposes as 4 and 5?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibits 4 and 5.

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: All right. Mark them received, Mr.

Reporter.

(The documents, heretofore marked General Counsel's Exhibit Nos. 4 and 5, were received in evidence.)

Q (By Mr. Sheridan) And would you look at General Counsel's Exhibit 6, and I ask if you received that?

(Witness examines document.)

THE WITNESS: Yes, sir, I received this, General Counsel's Exhibit 6.

Q (By Mr. Sheridan) The date is November 1. Do you know approximately when you received it?

A I received it approximately November 5th.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibit 6.

MR. BOOKSTEIN: I have no objection to the offer.

JUDGE CONSTANTINE: All right. Receive that also. Mark it received, Mr. Reporter.

(The document, heretofore marked General Counsel's Exhibit No. 6, was received in evidence.)

Q (By Mr. Sheridan) Mr. Dillenbeck, the September 20th letter refers to the cancellation of hospitalization; is that correct?

JUDGE CONSTANTINE: Which one -- I --

MR. SHERIDAN: I'm sorry -- General Counsel's Exhibit 5.

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) In fact, was your hospitalization

cancelled?

A Yes, sir, it was.

Q Now do you know whether or not the Union filed a petition for election?

A Yes, sir.

Q I'll direct your attention to on or about October 16th. Were you at a hearing on the petition that day?

A Yes, sir, I was.

Q And what, if anything, did you do at the hearing?

A I testified at that hearing.

Q For who?

A For the Union -- for the men who wanted Union representation.

Q All right, I'll direct your attention to on or about October the 18th of 1973. Did you receive a phone call from Mr. William Stevens?

A Yes, I did.

Q Now, to your knowledge, who is Mr. Stevens?

A Mr. Stevens was at one time, to my knowledge, a store manager in control, I believe, of both the Central Avenue and Quail Street Trading Port stores; however, to the best of my knowledge, Mr. Stevens has been on sick leave or non-employed for at least a year.

JUDGE CONSTANTINE: Are those stores part of the Respondent's -- you see, I have no way of knowing.

MR. SHERIDAN: Yes, as I -- are those owned by Trading Port?

THE WITNESS: Yes, they are.

JUDGE CONSTANTINE: Is that admitted?

MR. BOOKSTEIN: Well, I don't think it's ever been put in issue. Actually, --

JUDGE CONSTANTINE: I don't recall whether it's in the Complaint or not.

MR. BOOKSTEIN: It is. Trading Port is a wholesale and retail food business. We're involved here with the warehouse operation, which involves the wholesale operation. There are, however, two stores in Albany which Trading Port itself owns and supplies, and it's these stores to which the witness is referring.

JUDGE CONSTANTINE: Is that a stipulation?

MR. BOOKSTEIN: That's the fact.

JUDGE CONSTANTINE: All right, then, it's a fact -- that's better than a stipulation because sometimes I can ignore stipulation. I remember when a party stipulated that in Ohio gravity worked upward -- I ignored that stipulation.

(Laughter)

Q (By Mr. Sheridan) All right. Now, Mr. Dillenbeck, you testified that Mr. Stevens could be on sick leave at this time; is that correct?

A I really don't know. I believe that he had -- was no longer with the Company.

JUDGE CONSTANTINE: In other words, he was not connected at all with the Company?

THE WITNESS: My knowledge is that he is no longer connected with the Company.

JUDGE CONSTANTINE: All right, then, if you're going to get in any conversation between him and Stevens, I'm going to exclude it. He has no authority to speak for the Company after he's no longer employed by it.

Q (By Mr. Sheridan) Let me ask you this, Mr. Dillenbeck: Going back to your conversation of February, 1973, with Mr. Sam Tabachneck with both the employees. Did he refer to Mr. Stevens at that time?

A Yes, he did.

Q What did he say about him?

A He said that he did not want to see us do anything harmful to the hospitalization plan because he still carried Mr. Stevens on it.

Q So Mr. Stevens was still being carried on the hospitalization plan?

A Yes, sir.

Q Now what time did he phone you that evening, Mr. Stevens?

MR. BOOKSTEIN: I object to this as neither material or

relevant. As a matter of fact, there is no evidence here at all that Mr. Stevens occupied any supervisory capacity with the Respondent --

JUDGE CONSTANTINE: Or even that he was employed. Your own witness says he was not connected with the Company on October 18th. I'll exclude it on that ground.

MR. SHERIDAN: Well, your Honor, I would ask that it be put in subject to showing by this witness that this person was acting as an agent of the Company through statements of representatives of the Company.

MR. BOOKSTEIN: I would say, Mr. Examiner, that that request by Mr. Sheridan would simply be seeking, then, to do indirectly what you have already ruled you may not do directly, in that the motion to amend the Complaint to allege that Stevens, among others, was an agent under 213 of the Act has been denied.

JUDGE CONSTANTINE: I'll sustain the objection.

MR. SHERIDAN: Your Honor, I have evidence showing that this man was acting as an agent of the Company.

MR. BOOKSTEIN: Well, I object to Counsel -- I object to Counsel's statement as highly improper in view of the ruling on the motion and on the last objection.

JUDGE CONSTANTINE: Maybe you have but you haven't established it through this witness.

MR. SHERIDAN: Well, I haven't had a chance to yet.

JUDGE CONSTANTINE: Well, go ahead, ask the question and I'll pass on it if there's an objection. I've sustained the objection to the last question.

Q (By Mr. Sheridan) Did you have a conversation with Mr. Stevens this evening?

A Yes, sir.

Q Now the following day, did you call the Company?

A Yes, sir, I did.

Q And who did you speak with?

A I spoke with Mr. Avrum Tabachneck.

Q All right, and what was your conversation with Mr. Avrum Tabachneck?

A I told Mr. Avrum Tabachneck that I had been called by Mr. William Stevens.

Q And what did he say to that?

A He said he knew it.

MR. BOOKSTEIN: Now I object to this as being outside of the Pleadings. This does not bear on Mr. Stevens' supervisory capacity, and Mr. Stevens' status as an alleged agent is not in the case.

JUDGE CONSTANTINE: All right, I'll sustain the objection.

MR. BOOKSTEIN: And I move to strike the witness's last answer concerning the statement made to him by Avrum Tabachneck based on that ground.

JUDGE CONSTANTINE: Well, I'll grant that but not physically strike. I'm going to allow it to stay in.

MR. BOOKSTEIN: I understand, sir.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Your Honor, may I just point out that the Complaint, as it is presently now stated, says, "the following named persons occupied the positions set opposite their names, and have been and are now agents of the Respondent, acting on its behalf, and are supervisors," so that even --

JUDGE CONSTANTINE: I don't care what the Complaint says. He says that on October 18th this man was not employed. You can't contradict your own witness, or at least you can't impeach him.

MR. SHERIDAN: I understand that, your Honor. What I'm saying is the Complaint also alleges that they are agents as well as supervisors, and I'm not trying to impeach him; I'm trying to show that this individual, assuming that he's not a supervisor, was still acting as an agent of the Company.

MR. BOOKSTEIN: I respectfully submit that if Mr. Sheridan meant to allege that Mr. Stevens and the others were agents within the meaning of 213 of the Act, he wouldn't have felt the necessity for making the motion that he made at the outset of this hearing today.

JUDGE CONSTANTINE: All right, I'll adhere to my ruling.

MR. SHERIDAN: Your Honor, could I make an offer of proof?

JUDGE CONSTANTINE: Go ahead. I can't stop you from that. I did once and the Board reversed me. I think the Board is wrong. I know more law than those jackasses in Washington. Put it in the record that way, I don't care. I have nothing but contempt for the NLRB.

MR. SHERIDAN: All right, your Honor, I would offer to prove that if Mr. Dillenbeck were permitted to testify, he would testify that Stevens called him on the 18th and explained to him that he was a friend of his, he hated to see Dillenbeck get into this kind of trouble, and he said a better solution would be worked out and asked Dillenbeck to meet in private with Isadore Tabachneck. Stevens said that he thought if Dillenbeck spoke with Isadore Tabachneck everything could be ironed out.

JUDGE CONSTANTINE: Is that the end of the offer of proof?

MR. SHERIDAN: And that the following day, when Mr. --

JUDGE CONSTANTINE: Well, wait a minute, one thing at a time. Is that the end of the offer of proof?

MR. SHERIDAN: Yes, that's the end of it.

JUDGE CONSTANTINE: All right, now go on to another

question. Let's see what happens. If I sustain an objection, you can make another offer of proof.

MR. SHERIDAN: And the following day --

JUDGE CONSTANTINE: Ask a question.

MR. SHERIDAN: Well, this is part of what you've already ruled out. I'm now talking about his conversation of the following day.

JUDGE CONSTANTINE: With whom?

MR. SHERIDAN: With Mr. Avrum Tabachneck.

JUDGE CONSTANTINE: Well, you didn't say that. I thought you were talking about Stevens. All right.

MR. SHERIDAN: That's the end of the offer of proof as to his conversation with Stevens.

JUDGE CONSTANTINE: All right. Now go ahead.

MR. SHERIDAN: And if permitted to testify, he would also testify that on the 19th, the following day, he called Avrum Tabachneck and said he did not wish to meet with a representative of the Company, and Avrum Tabachneck said he knew about this meeting, it was supposed to have been set up, and he thought his Uncle was very foolish to set up that type of a meeting. That's the end of the offer of proof.

JUDGE CONSTANTINE: I'll make a ruling right now, even though it's an offer of proof, that that, in my opinion, as a matter of law fails to establish agency on the part of Stevens. Let the Board reverse me. As a matter of law that

is not -- doesn't establish agency. Go ahead. Go on to your next question.

MR. SHERIDAN: Your Honor, could I just ask that I be permitted, as I will be putting in through other witnesses, to show -- that if I'm able to show that Mr. Stevens was acting as an agent of the Company through other witnesses, that you'd possibly consider changing your ruling as to this particular conversation?

JUDGE CONSTANTINE: I will always change it if you prove it but you have to prove it. In that case there is no problem.

MR. SHERIDAN: All right.

Q (By Mr. Sheridan) Mr. Dillenbeck, I'll direct your attention to -- by the way, do you know when the election was held?

A December 3rd., to the best of my knowledge.

Q Was it the 3rd or the 4th?

MR. BOOKSTEIN: We will stipulate it was the 4th.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) All right, I'll direct your attention to Friday, November the 30th -- the Friday before the election. Were you in a place called the Orchard Tavern?

A Yes, I was.

Q And where is this in relation to the Company?

A It's right diagonally across the street from the

Company.

Q And was anyone in there with you?

A I was there with Charles Ballou, with Ira Stockwell, and with Robert Bishop, and Frank Houck for a while.

Q Did there come a time when Mr. Houck left?

A Mr. Houck left, yes.

Q While you were there, did there come a time when any Company officials came into the Tavern?

A Yes, sir, Mr. Isadore Tabachneck, Avrum Tabachneck, Mr. William Brunelle, as Company officials came in, accompanied by a man — I believe his name is Manino (phonetic), he operates the G.E.X.

Q Now when was this during the day?

A The noon hour.

Q And while you were there, did Mr. Isadore Tabachneck say anything to you employees?

A Yes. He said —

Q What did he say?

A To me, he said to me, that I would never be back there. He was doing fine without me. His crew was doing much better work than I could ever do, that I'd never come back. He didn't care what happened to me, really, I would never come back to work for him. To Mr. Charles Ballou, he stated that Charlie might as well go hang around the racetracks and be a jockey or something because he wasn't coming back to

work there and he shook his cigar at Mr. Ballou and he said, "You know that White Owl commercial," he says, "we're going to get you." He also stated that we were going to lose the election.

Q Who was that?

JUDGE CONSTANTINE: Do you claim that's an unfair labor practice?

MR. SHERIDAN: Yes, your Honor, that's alleged in the Complaint.

JUDGE CONSTANTINE: That you tell somebody he's going to lose the election?

MR. SHERIDAN: Oh, no. I mean what has already been testified to. I didn't know which statement you were referring to.

JUDGE CONSTANTINE: Well, I was speaking of the last statement.

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: Have you ever heard of an employer always came around and said, you're going to win the election?

MR. SHERIDAN: No, I thought you were referring to the other statement.

Q (By Mr. Sheridan) Now, since the strike ended, have any employees been recalled?

A Yes.

Q Do you know how many?

JUDGE CONSTANTINE: Can it be agreed on? Do we have to take testimony on that?

MR. BOOKSTEIN: I think I can tell you. Do you have 10?

MR. SHERIDAN: Yeah, I believe so.

JUDGE CONSTANTINE: Is it 10?

MR. SHERIDAN: Yeah.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: We'll stipulate that 10 have returned to active employment since the termination of the strike.

JUDGE CONSTANTINE: All right, that's a stipulation.

Q (By Mr. Sheridan) Now, of those 10, Mr. Dillenbeck, how many have more seniority than you have with the Company?

A One.

MR. BOOKSTEIN: I object to the form of the question. If --

JUDGE CONSTANTINE: If he knows.

MR. BOOKSTEIN: If Mr. Sheridan is speaking about having earlier hiring date with the Company, I have no objection to it, but I think seniority is a characterization of that.

JUDGE CONSTANTINE: No, total length of service is a question of seniority. If he knows their total length and he knows his own, he may answer it.

MR. BOOKSTEIN:

MR. BOOKSTEIN: I have no objection to that.

JUDGE CONSTANTINE: Are you familiar with each one's total length of service?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right, then, I'll allow the question.

Q (By Mr. Sheridan) Of those who have been recalled since the strike, how many have more service than you?

A Mr. Robert Bishop only.

MR. BOOKSTEIN: And in addition, so there may be no doubt about my position, I object to this line of testimony as neither material or relevant unless there is some foundation showing that he followed a seniority system at Trading Port.

JUDGE CONSTANTINE: Yeah, I understand that. I haven't decided anything except that the evidence admissible. You may, as part of your case, show that you didn't follow seniority. I'm not making any ruling at this time that you did. That may be an issue in the case. I'll have to decide that.

Q (By Mr. Sheridan) Mr. Dillenbeck, of all of the employees now working in the warehouse, in addition to Mr. Bishop, how many have more service than you, and who are they?

A I believe six, besides Mr. Bishop. That would be

Donald Garhartt, Edward Kocienski, Howard Flagler, Robert Bahan, Casper Dambrose, and I think that's all.

Q All right. Now there has been reference as to whether or not the Company used seniority. Let me ask you this, Mr. Dillenbeck. During the time that you worked there, was seniority used for any purpose, and if so, in which way?

JUDGE CONSTANTINE: Well, let's take one question at a time. That's a double question.

Q (By Mr. Sheridan) Was it used?

A Yes, sir.

Q In which way?

A It was used to pick vacations; it was used as a determining factor in how much hospitalization -- how much you contributed toward your hospitalization insurance.

Q Well, to get back up to the vacation. You say it was used to "pick." Explain what that means?

A There was a list put out every year to pick vacations. Mr. Solomon, Mr. Robert Solomon, who was then the warehouse manager, always told us that we had to write our names on that list for what vacation we wanted according to our seniority.

Q Did your seniority have anything to do with how much vacation you got?

A It did. The first year you received one week; the

second year I believe you received two weeks, and then it's two weeks from thereon in.

JUDGE CONSTANTINE: I might add that that second part I don't consider seniority. Total amount of service is one thing, seniority is another.

Q (By Mr. Sheridan) All right. Now you started to--

JUDGE CONSTANTINE: We have that in the United States Government, in case you don't know it. The amount of vacation depends on the number of years of service. In my opinion that's not a seniority question; but go ahead.

Q (By Mr. Sheridan) You started to testify about hospitalization. Would you explain how seniority has anything to do with that?

A When you first start with the Company, or started with the Company, you became eligible to take out hospitalization, which is only -- I think there was a certain time of the year it was open for you to apply for it. The first year -- you paid percentages of it for the first, I believe, three years and after three years, the Company took over the total payments of it.

Q Is there any other way?

A There was a Profit Sharing Retirement Plan in which it was determined by your years of service how much of a percentage of the Company contributed money you could get out of that, the Profit Sharing Retirement Plan, if you left the

Company.

Q Anything else that you can recall, at any time while you were --

A There was at one time a Christmas bonus set up whereby the first year you were employed, I think you got ten dollars --

JUDGE CONSTANTINE: Was that in effect at the time we're talking about?

THE WITNESS: It was not in effect at the time.

JUDGE CONSTANTINE: All right, then, let's not go into it.

Q (By Mr. Sheridan) Now, Mr. Dillenbeck, during the time you worked there, was there ever any other time when there was a layoff at the plant?

A Yes, sir.

Q About how long ago was this?

A I would say about five years ago.

Q And do you know how many people were laid off?

A Exact numbers -- somewhere close to ten people.

Q And what occasion to lay off on this occasion?

A We had a --

JUDGE CONSTANTINE: It doesn't matter. No one contends there was anything illegal about the layoff, do you?

MR. SHERIDAN: No, no.

JUDGE CONSTANTINE: All right. I know what you're

leading to. Get right to the point.

Was seniority followed?

THE WITNESS: Yes, it was.

JUDGE CONSTANTINE: Is that what you were going to ask?

MR. SHERIDAN: No.

JUDGE CONSTANTINE: What I mean is, was seniority followed in making layoffs?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) Now what was your job when you worked there, Mr. Dillenbeck?

A My title was Head Railroad Receiver.

Q What did you do?

A Primarily worked on the railroad receiving dock, putting away stock or unloading freight cars, or checking in the product that came out of the freight cars, checking the purchase orders to make sure the men received them properly and signed them properly, turned them into the office, entered them into stock, discussed with Mr. Solomon which cars we should unload during the course of that particular day.

JUDGE CONSTANTINE: Is this an issue in the case?

MR. SHERIDAN: I just want to show the man's abilities, your Honor. It's always an issue --

JUDGE CONSTANTINE: No, I'm not interested in his

abilities at all.

Q (By Mr. Sheridan) Did you work with anyone else?

A Primarily with Jim Houck and Farley Riddick.

Q Did you do any other work while you were there?

A I did a lot of repair work, welding, setting up racks, steel racks in the warehouse, making rails around the railroad, dock boards for the railroad, plates to cover the floors where there were cracks in the steel plates, moulding on machinery.

Q Did anyone else weld?

A Jim Houck and I primarily did the welding. Jack Hebert could do welding but not very well.

Q Who erected the -- did they have racks in the warehouse?

A Yes, they did.

Q Who erected them?

A At one time or another I moved or erected all of those racks.

Q Did there ever come a time when it was necessary to change them for one reason or another?

A Yes, many times.

Q Why would this come about?

A If a product line was dropped or changed in size, or moved to any other location in the warehouse, for whatever reason, the racks would either be adjusted or torn down or set up, and I did that.

JUDGE CONSTANTINE: I want to interject at this point. When the witness testifies that he was discharged for incompetence, or for some other reason, and it's your contention that's a pretense, then I will take all his duties to show that it couldn't have been, and that it was pretense, but there's -- he didn't say he was discharged for incompetence. Why do you go into all this?

MR. SHERIDAN: Well, your Honor, I believe that at some point during the hearing it's going to be in issue --

JUDGE CONSTANTINE: Well, then don't anticipate defenses. You put him on as part of your rebuttal.

MR. SHERIDAN: -- as to why Mr. Dillenbeck was not called back.

JUDGE CONSTANTINE: He said why he wasn't called back, and I'm going by what he said. Now, if you want to later on establish through the Respondent that his incompetence was it, then I'll let you, as part of your rebuttal -- I'm not precluding you -- but I will let you, as part of your rebuttal, show that this man was competent and that he could do all these jobs, but I'm not going to let you anticipate defenses at this point.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right. Let's declare a short recess.

MR. SHERIDAN: In response to Mr. Bookstein's request,

let the record show that I'm turning over to Mr. Bookstein a data from Mr. Dillenbeck of 10 pages.

MR. BOOKSTEIN: Thank you.

JUDGE CONSTANTINE: Well, I want the record to show, while we're still on the record, that this is not given to him to aid him in discovery or any other purpose, only for purposes of showing or ascertaining whether there is any inconsistency between what he's written there and what he's testified to. I want to make it clear it's not a discovery thing; therefore, my recess is going to be shorter than usual. I'll make it a ten-minute recess.

MR. BOOKSTEIN: Thank you.

(A ten-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Please proceed with your cross-examination, Mr. Bookstein.

I want the record to show that Mr. Pozefsky said he does not have any questions.

CROSS EXAMINATION

Q (By Mr. Bookstein) Mr. Dillenbeck, immediately prior to our taking a recess at 2:30 p.m. this afternoon, when you were on the stand, do you recall that you had listed for Mr. Sheridan persons who you testified were present at a September 8 meeting in the conference room at the Trading Port?

A Yes, sir, I do.

Q And September 8th was what day of the week?

A Saturday.

Q Now following the recess you were asked again by Mr. Sheridan about that subject, were you not?

A Yes, sir.

Q Did you add some names at that time?

A Yes, sir, I did.

Q And that was the result of what?

A Of my own -- re-examining my own recollection. I had mixed up in my mind that meeting with the following meeting, after the strike, as to who was present at the meeting.

JUDGE CONSTANTINE: I might point out that these little discrepancies don't bother me. I'm more interested in what was said at the meetings, not a hundred percent accuracy as to who was present. Now if he said A said something and A wasn't there, that's different, but I don't care if A was there or B was there. I want to know what was said, just so you'll know how I react to these things. I'm not a jury. I go to the heart of things. That might impress a jury.

Q (By Mr. Bookstein) Now in soliciting signatures on cards, Mr. Dillenbeck, did you at any time say words or substance to anyone that so many people have signed and if you don't sign and the Union gets in, then you'll be out of a job?

A No, sir, I did not.

Q Did you hear that statement made by anyone in soliciting cards?

A No, sir.

Q Returning to the time when sick pay was discontinued at the Trading Port. Isn't it a fact that at that time, approximately the same time the sick pay was discontinued, or sick leave was discontinued, that there was an increase in the premium cost of Blue Cross-Blue Shield?

A Yes, sir, I believe there was.

Q And isn't it a fact that Mr. Sam Tabachneck said to warehouse employees, in words or substance, that the Company would pick up the increased premium cost of Blue Cross-Blue Shield or -- and discontinue the sick leave policy, or it would continue the sick leave policy, that the employees would have to pick up the increased premium cost?

A That's very possible, sir, yes.

Q And didn't he, in fact, give the employees essentially a choice as to that, saying the Company was not in a position to do both?

A He asked us to vote on it, yes, sir.

Q All right. And that was done, wasn't it?

A Yes, sir.

Q And it was by that decision of the employees that the Company pay the entire Blue Cross-Blue Shield premium

increase but the sick leave policy was discontinued; isn't that so?

A Yes, sir, it was.

JUDGE CONSTANTINE: I didn't get the answer. What was the vote?

MR. BOOKSTEIN: I didn't ask for a number as it was a majority.

JUDGE CONSTANTINE: No, I don't mean the vote. I mean what did they decide -- I used the wrong word. They decided to accept the sick leave or to accept the increased payment on the premium?

THE WITNESS: To accept the loss of sick leave and allow the Company to continue paying the premium.

JUDGE CONSTANTINE: All right, thank you.

Q (By Mr. Bookstein) Now is there and was there during September of 1973 a computer at Trading Port?

A Yes, sir.

Q And was that computer there on September 5?

A To the best of my knowledge, yes, sir.

Q And was Walter Snyder the individual who operated that computer?

A Yes, he was.

Q And were there girls who were responsible for punching data for Mr. Snyder's use in inserting it into the computer?

A Yes, key punch operator, yes, sir.

Q All right. And in connection with performance of his duties as computer operator he frequently gave instructions to those key punch operators, did he not?

A Yes, sir.

Q And are not those the individuals to whom you referred when you testified on direct examination that Snyder gave directions to other people in the office?

A Yes, sir, they are.

Q And do you know Dora Pialko (phonetic)?

A Yes, I do.

Q And isn't it a fact that she was manager of the office?

A Yes, sir. I know she was the primary manager of the office, yes.

Q Not Walter Snyder, isn't that true?

A To the best of my knowledge, she's the only one I was ever told was manager.

Q And did you ever hear Mr. Snyder give any instructions or directions to any other office employee except people who were handling key punch data for his use in the computer?

A No, sir, I did not.

Q Now when on September 6th, as you've testified, Mr. Brunelle spoke with you at the railroad dock, isn't it a fact that his status with the Company was buyer?

A At that time, yes, sir.

Q And in that conversation, which you have testified took

place, isn't it a fact that Mr. Brunelle told you, his words or substance, that he had not been sent out there by anyone to talk to you?

A Yes, he did tell me that.

Q Is it not a fact, Mr. Dillenbeck, that prior to the time you were hired at the Trading Port you were connected with the Albany Police Department?

A Yes, sir.

Q Is it not also a fact that you received considerable notoriety when you left the Department?

A Yes, sir.

Q And that was in connection, was it not, with your efforts on behalf of establishing a labor organization at the Albany Police Department?

A No, sir, the PBA was not a labor organization.

Q All right. In any event, it was in connection with the activities of the PBA that led to your discharge from the Department, right?

A No discharge, sir, I resigned.

Q All right, your resignation. In any event, the entire incident -- it's a bit of ancient history -- but it received considerable notoriety at the time, did it not?

A Yes, sir, it did.

Q It was well known in the community?

A Yes, sir.

Q And isn't it a fact it was well known to the Tabachnecks when you were hired at the Trading Port?

A Yes, it was.

Q Did you, when you were present on the picket line during the three week strike, hear Isadore Tabachneck say, in words or substance, to either yourself or people with you on the picket line, if you guys don't come back, you won't have no jobs because we won't have no business?

A Yes, sir.

Q And was that said in a matter-of-fact way?

A Yes, sir.

Q Do you know the meaning of the expression "a kibitzer?"

A Yes.

Q How long have you known Isadore Tabachneck?

A Oh, for a good many years, since the early 50's.

Q Would it be fair to say he's a "kibitzer?"

A Yes, sir, it would be fair to say that, yes.

JUDGE CONSTANTINE: That doesn't help me. You better tell me what a "kibitzer" is.

MR. BOOKSTEIN: Well, you'll have an opportunity to observe that for yourself, sir.

JUDGE CONSTANTINE: I thought I knew Latin but I see that I don't.

(Laughter)

JUDGE CONSTANTINE: Let the record show that everyone

is smiling. I didn't think I could get anybody to smile.

Q (By Mr. Bookstein) Now did you also attend a meeting at the conference room at Trading Port on Friday, September 7th?

A It has seemed to me that there was another meeting and I could not really recall it but it's very possible.

Q In any event, on the -- the meeting to which you've testified on Saturday, September 29, isn't it a fact that Sam Tabachneck said in words or substance, that things, the work, was so slow that he certainly didn't think he could take everyone back at that point?

A Yes, sir.

Q In the meeting of employees on September 5, which you testified about, when Sam Tabachneck spoke, did he make the statement then, in words or substance, that cards are not the same as votes?

A Yes, sir.

Q Taking you to the incident you described on Friday, November 30th, at the Orchard, when Isadore Tabachneck made the remarks, which you testified he made, was the gentleman from G.E.X. present?

A He was present. Mr. Isadore Tabachneck --

JUDGE CONSTANTINE: No, you can answer the question "yes" or "no", or you don't remember.

THE WITNESS: He was present.

JUDGE CONSTANTINE: All right, that answers the question.

THE WITNESS: For part of it.

Q (By Mr. Bookstein) All right. And was he present when Mr. Tabachneck spoke to you?

A Yes.

Q Was he present when he spoke to the next person?

A Mr. Ballou -- I don't believe so.

Q And did he ever speak to Mr. Frank Houck?

A He said to Mr. Frank Houck, in reference to the men who were doing a great job and he didn't need me back, Mr. Frank Houck and Mr. Robert Bishop were the men he was referring to.

Q Frank Houck was there for a while in the Orchard, was he not?

A Yes, sir.

Q Was he there when Isadore Tabachneck made this comment you just testified to?

A As to Mr. Houck being there, yes, sir.

Q And was the gentleman from G.E.X. still there?

A Yes, I believe he was.

Q But you think he was not there when he made the comment about Mr. Ballou --

A Mr. Tabachneck left with Mr. Manell (phonetic), I believe his name is, and with Avrum and with Luke, and then Mr. Tabachneck returned by himself.

Q I see. And when he returned by himself, who did he speak to?

A He spoke to Charles Ballou and myself.

Q All right. Now he had spoken with you earlier, when the gentleman from G.E.X. and Ballou and Avrum were with him, correct?

A Yes, sir.

Q Did he have anything further to say to you when he came back alone, or was this simply to Mr. Ballou?

A He made some remarks to me, that I wouldn't be back to work there. I made a remark to him, that I would be back to work there.

Q Did he -- withdrawn. The Orchard is more than just an eating place, is it not?

A It's a tavern.

Q And at the time of this event you've described on November 30, had any of the people involved in it been drinking?

A Charles Ballou, Robert Bishop -- not myself, I was drinking Coca-Cola.

Q And what were they drinking?

A Beer, to the best of my recollection.

Q Do you know the extent to which they had been drinking beer on that occasion?

A They had come in at noon -- it was perhaps 12:15 or

12:20 when the first remarks were made. It was perhaps 12:40 or 12:45 when Mr. Tabachneck came back, so a period of 45 minutes, perhaps.

Q Isn't it a fact that Mr. Ballou has a reputation for being a rather constant drinker?

JUDGE CONSTANTINE: Well, that's not an issue in the case.

MR. SHERIDAN: Objection.

JUDGE CONSTANTINE: I'll sustain the objection. If he testifies, that's another matter, but Ballou hasn't testified yet.

MR. BOOKSTEIN: I would ask Mr. Sheridan to stipulate that Mr. Ballou is in the room, unless he's left.

THE WITNESS: I think he's left.

MR. BOOKSTEIN: All right. I didn't know that.

JUDGE CONSTANTINE: I can't help you. I don't know what he looks like.

MR. BOOKSTEIN: I don't happen to have eyes in the back of my head.

JUDGE CONSTANTINE: Is that spelled B-a-l-l-o-u, Ballou?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: I'm just curious because back home there was a prominent attorney by the name of Ballou. I was wondering if this man was related to him. He spelled his

name B-a-l-l-o-u.

Q (By Mr. Bookstein) Now on the Blue Cross-Blue Shield, is it correct to say that during the first year of an employee's employment the Company paid 10 percent of the premium cost?

A I believe that's the way it worked, yes, sir.

Q And that --

A That was, I believe, after the first year, if I'm not mistaken.

Q Well, which do you say it was?

A I think it was after a year.

Q And was there a time when the Company paid 20 percent of the total premium cost?

A Yes.

Q And when do you recall that began?

A That was after the following year.

Q After the second year?

A I think so, yes.

Q And did there come a time when the Company would pick up the entire cost with the exception of one dollar per week?

A I believe after the third year they did that, yes, sir.

JUDGE CONSTANTINE: I might make an offhand observation, subject to changing my mind after I look at the briefs, that I don't think that particular small part of the case

that you're examining on constitutes, in my opinion, they're following seniority because it might be five guys hired at different times but in the same year; all those five guys would get the same reduction in premiums.

MR. BOOKSTEIN: Precisely my own interpretation.

JUDGE CONSTANTINE: But I haven't made up my mind. That's just my offhand reaction. It doesn't mean that they weren't following seniority, but on most -- in that area I don't think they were following seniority.

MR. BOOKSTEIN: Because anybody hired within the time span, regardless of date, was getting the same treatment.

JUDGE CONSTANTINE: That's my point, but I have an open mind. They can argue in their brief that it does constitute seniority.

Q (By Mr. Bookstein) Now you referred, Mr. Dillenbeck, to a layoff about five years ago?

A Yes, sir.

Q And you say there was a layoff of approximately how many men?

A I think 10 -- I'm not really certain.

Q Do you recall the occasion for that layoff?

A The loss of the Saveway Supermarkets as a customer.

JUDGE CONSTANTINE: I prevented them from going into it. I said it didn't matter what was the cause of the layoff, sc I don't think you can go into it. There was a

layoff; I did allow that much in. I also allowed him to state that they did follow seniority, and, of course, you're entitled to contradict that when you put your case on, Mr. Bookstein.

MR. BOOKSTEIN: I have no further questions.

JUDGE CONSTANTINE: All right. I think we're making such good progress, I'm inclined to adjourn now, it being 6:22.

MR. SHERIDAN: Your Honor, I do have a couple questions on redirect.

JUDGE CONSTANTINE: Well, you can't go over your direct --

MR. SHERIDAN: I'm not going over my direct, your Honor.

JUDGE CONSTANTINE: All right. I want to point this out, that on my own, regardless of whether there's an objection, I have excluded questions on redirect as improper redirect. If you could have asked this on your direct, that's it, you don't get a second bite at the apple. Go ahead.

MR. SHERIDAN: These are questions raised by cross-examination.

JUDGE CONSTANTINE: Well, maybe so, but if you could have answered these on your direct, the fact that he brought it out on cross doesn't give you a second chance. Go ahead.

REDIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Dillenbeck, Mr. Bockstein brought out the name of a Dora Pialko (phonetic) as being the office manager?

A Yes, sir.

Q Where do the office girls work that she supervises?

A In the lower office. There are two levels of offices. She works primarily in the lower one.

Q And where do the other office clericals work, along with Mr. Snyder?

A Between her office there is Sam Tabachneck and Avrum Tabachneck's office, and then there's the buyer's, there's a wall, and out beyond that is where Mr. Snyder worked.

Q A different location?

MR. BOOKSTEIN: Well, I object to Counsel leading the witness.

JUDGE CONSTANTINE: I sustain the objection. He's your client -- I mean he's your witness. I think you're leading.

Q (By Mr. Sheridan) Do you know whether or not this Dora Pialko (phonetic) has ever supervised the computer girls -- girls who worked there?

A I don't really know.

Q Now Mr. Bookstein raised the question of Mr. Brunelle's status when he talked to you on September 6th, and you testified he was a buyer.

A Yes, sir.

Q Has his status changed?

A Yes, sir.

Q And when did it change?

A Right after the strike.

Q Right after the strike --

A During --

Q During the strike?

A During the strike, I believe it was.

Q And what is his present position and has been since then?

A He's the warehouse manager.

Q And who is in charge of the warehouse -- the entire warehouse?

A The warehouse manager, Mr. Brunelle.

MR. SHERIDAN: Nothing further.

JUDGE CONSTANTINE: All right. Do you want to adjourn now -- it's 6:24, gentlemen, or go to 7:00. I said we would go to 7:00. It's up to you. I'd like to make progress. I think we're making some progress. We did not put in a full day today, so I'm going to leave it to you gentlemen if you want to continue to 7:00 or adjourn now. It's up to you gentlemen.

MR. BOOKSTEIN: We usually go to 5:00. We did put in a full day, because --

JUDGE CONSTANTINE: Yeah, but you were out for two or

three hours.

MR. BOOKSTEIN: I was out from 2:30 to --

JUDGE CONSTANTINE: To 5:00.

MR. BOOKSTEIN: You're right.

JUDGE CONSTANTINE: Plus the fact we didn't start until 1:00.

MR. BOOKSTEIN: I don't care. I'm agreeable to whatever the --

JUDGE CONSTANTINE: I'm agreeable to whatever you gentlemen want. Do you want to proceed?

MR. SHERIDAN: The only thing, whatever witness I call will go beyond 7:00 o'clock, that's the only thing. I would prefer it, if it's agreeable, to adjourn at this point.

JUDGE CONSTANTINE: I leave it to you gentlemen.

MR. BOOKSTEIN: I'm happy to accommodate you, Mr. Sheridan, anyway.

JUDGE CONSTANTINE: Mr. Pozefsky?

MR. BOOKSTEIN: Mr. Pozefsky, too.

JUDGE CONSTANTINE: Do you want to go on?

MR. POZEFSKY: I'll do what the other parties want.

JUDGE CONSTANTINE: What do the other parties want?

MR. SHERIDAN: I would just as soon adjourn at this point.

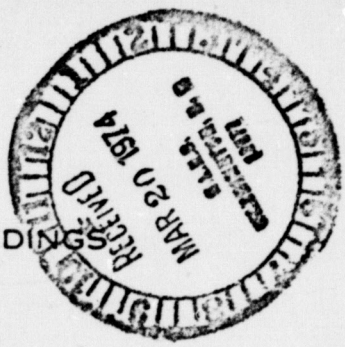
JUDGE CONSTANTINE: All right, then, 9:30 tomorrow morning.

MR. BOOKSTEIN: All right.

JUDGE CONSTANTINE: We stand adjourned until then.

MR. BOOKSTEIN: Thank you, sir.

(Whereupon, at 6:30 p.m., the hearing was adjourned, to reconvene at 9:30 a.m., Wednesday, March 6, 1973, in the same place.)



FIRST COPY

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

National Labor Relations Board

DOCKET NO. 3-RC-5853
3-CA-5506

IN THE MATTER OF:

TRADING PORT, INC.

Respondent

-and-

LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner

PLACE: Albany, New York

DATE: Wednesday, March 6, 1974

PAGES: 114 - 271

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

Third Region

In the Matter of:		
TRADING PORT, INC.		
Respondent		
-and-		Case No.
LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA		3-RC-5853
Petitioner		
TRADING PORT, INC.		
-and-		Case No.
LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA		3-CA-5506

Hearing Room
The Standard Building
11th Floor
112 State Street
Albany, New York

Wednesday, March 6, 1974

The above-entitled matter came on for further hearing, pursuant to adjournment, at 9:30 a.m.

BEFORE:

Honorable JAMES V. CONSTANTINE, Administrative Law Judge

APPEARANCES:

THOMAS J. SHERIDAN, Esq. MICHAEL MILLER, Esq.	National Labor Relations Board, Third Region, 112 State Street, Albany, New York; appearing as Counsels for the General Counsel.
EDWARD L. BOOKSTEIN, Esq.	Kohn, Bookstein & Karp 100 State Street Albany, New York; appearing on behalf of the Respondent.
WILLIAM POZEFSKY, Esq. DOMINICK TOCCI, Esq.	Pozefsky, Tocci & Pozefsky 112 State Street Albany, New York; appearing on behalf of the Charging Party.

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PROCEEDINGS

9:30 a.m.

JUDGE CONSTANTINE: On the record, please, gentlemen, let's proceed.

MR. BOOKSTEIN: I should like to state, if I may, Mr. Examiner, that at the close of the hearing yesterday I returned to Mr. Sheridan the 10½ page statement of Mr. Dillenbeck which he produced upon the conclusion of Mr. Dillenbeck's direct examination on my motion.

JUDGE CONSTANTINE: All right, the record may show that you have returned that.

Please proceed Mr. Sheridan. In the off-the-record discussion, you said it was possible you could enter into some stipulations. Have you any to read into the record?

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: The parties have agreed to stipulate as follows: At all times material, since on or about October 3, 1973, William Brunelle has been and is Respondent's warehouse manager and a supervisor within the meaning of Section 211 of the Act.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Shall I pause after each one to make sure everyone is in agreement?

JUDGE CONSTANTINE: Well, I was going to say, I will

ask Mr. Bookstein, but I assume that these have been agreed to so I won't have to ask you.

MR. BOOKSTEIN: That's correct.

JUDGE CONSTANTINE: Then you won't have to pause but do number them, please — that's (1), now what is (2)?

MR. SHERIDAN: Yes. (2), is that the September 13th and September 20th letters, which are introduced into evidence as General Counsel's Exhibits 4 and 5, were sent to all of the strikers. And the third one is that the November 1, 1973 letter, which was introduced into evidence as General Counsel's Exhibit 6, was sent to all the employees who are named in Schedule C of the Complaint.

JUDGE CONSTANTINE: Very well. I think that's going to save a lot of time, so you won't have to put any of the employees on who are in Schedule C to prove that this thing was sent to them.

Is there anything else?

MR. SHERIDAN: As far as the stipulation, no, your Honor.

JUDGE CONSTANTINE: Well, then, will you please proceed?

MR. SHERIDAN: Yes. General Counsel calls Raymond Valerio to the stand.

JUDGE CONSTANTINE: Will you spell his last name, please?

MR. SHERIDAN: V-a-l-e-r-i-o.

Whereupon,

RAYMOND VALERIO

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please be good enough to give your name and address to the Reporter for the record.

THE WITNESS: Raymond Valerio, 20 Cortland Place, Albany, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Valerio, did you ever work for Trading Port, Inc.?

A Yes, I did.

Q And when did you start working for them?

A October, 1970.

Q And what was your job?

A I was primarily the damage man.

Q And could you briefly describe what your duties were?

A You went around the warehouse and picked up all the damaged stock, and you would try to take two or three cases of it and recoup it into one or two good cases; you made out the railroad orders, like if railroad damage came in, it was all given to the salvage man, and you had to make those orders up and put them aside and hold them; in addition to that, I loaded trucks, unloaded trucks, unloaded the trains.

I was an order selector, and for a while I even worked on the machines.

JUDGE CONSTANTINE: I would like to ask Mr. Bookstein a question. Unless the duties or the nature of the work of these witnesses is an issue, I'd just as soon not go into their duties. Is it in issue?

MR. BOOKSTEIN: No, unless Mr. Sheridan has some preliminary reason for wanting this. I don't --

JUDGE CONSTANTINE: There's no point in going into -- to describe what they do.

MR. SHERIDAN: Well, basically, the reason I'm putting it in is to show that the employees in the warehouse generally did all the jobs in the warehouse --

JUDGE CONSTANTINE: Well, is there an issue? Does it matter what job --

MR. SHERIDAN: I don't know what the issues are going to be at this point. I have to --

JUDGE CONSTANTINE: Well, this is not a compliance case. Assuming that I find a violation and you have a further hearing on back pay, you may want to know what their duties are, but I'm not interested in them unless it's in issue. I don't think it is, so let's try to save time.

MR. SHERIDAN: Okay.

JUDGE CONSTANTINE: It's enough for the man to say that he's a damage man in the warehouse.

Q (By Mr. Sheridan) Now I'll direct your attention to on or about August 29th. Did you attend a meeting at the Union Hall that day?

A Yes, I did.

Q And at this meeting, did you sign anything?

A Yes, I signed the cards.

Q You signed what?

A The cards for the Union.

Q Okay. And did you get anything else at the meeting?

A I took cards for Mr. Sim, who lives close to me. He was on vacation at that time. I brought them to his house and he signed them.

MR. SHERIDAN: Would you mark this for identification, please, as General Counsel's Exhibit 7.

(The document above-referred to was marked General Counsel's Exhibit No. 7 for identification.)

Q (By Mr. Sheridan) I show you what's been marked for identification as General Counsel's Exhibit 7 and ask if you've ever seen it before?

(Document shown to witness.)

THE WITNESS: Yes. That's the card Mr. Sim signed.

Q (By Mr. Sheridan) And I direct your attention to the date that appears on there. Is that the date he signed it?

A Yes.

Q And what, if anything, did you say to him when you gave

him the card?

JUDGE CONSTANTINE: Well, is there an issue as to what he said?

MR. BOOKSTEIN: I don't know what he said.

JUDGE CONSTANTINE: All right. Do you contest this card?

MR. BOOKSTEIN: I don't know yet.

THE WITNESS: I told him that we were forming a union and all that was required was the majority, and this we had already, and I told him who had signed.

MR. BOOKSTEIN: I assume this is being offered as a verbal act so I have no hearsay objection to it.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) And did he sign in your presence?

A Yes, he did, filled them out and signed them in my presence and his wife's.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibit 7.

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: All right, receive it, Mr. Reporter, in the absence of objection.

(The document, heretofore marked General Counsel's Exhibit No. 7, was received in evidence.)

Q (By Mr. Sheridan) Now I'll direct your attention to on or about September 5, 1973. Did you attend a meeting at

the warehouse?

A Yes, I did.

Q And who was at the meeting?

A Most of the warehouse workers that were in that day. Mr. Solomon called them up on the intercom.

Q What was Mr. Solomon's position at that time?

A Warehouse supervisor.

JUDGE CONSTANTINE: You were in Court yesterday, weren't you?

THE WITNESS: Yes, I was.

JUDGE CONSTANTINE: Do you remember when Mr. Dillenbeck described this meeting?

THE WITNESS: Yes.

JUDGE CONSTANTINE: Do you have anything to add to what he said, or detract?

THE WITNESS: All I have to add to it was that he kept saying --

JUDGE CONSTANTINE: Wh 's "he?"

THE WITNESS: Mr. Tabachneck -- when he went for his -- when you go to make your vote as to whether you strike or not, he repeated, like, who has prevailed, and he pointed to all the people that were up there and he says, "They stand to be hurt, you stand to be hurt, and they're going to lose their jobs as well as you."

JUDGE CONSTANTINE: Otherwise you --

THE WITNESS: Otherwise it was, in essence, the same.

JUDGE CONSTANTINE: The same as Mr. Dillenbeck?

THE WITNESS: Yes.

JUDGE CONSTANTINE: All right. It isn't necessary for him to describe all over again who was there or what was said.

Q (By Mr. Sheridan) All right. Now, following that meeting, did you have a conversation with Mr. Isadore Tabachneck?

A Yes.

Q And how did this come about?

A He called me into his lower office. He had a railroad order that had to be made up. When we got into the hall, he told me that he was fighting for our rights, and that when we went to the meeting, he wanted me to talk to the "boys," as he referred to it, and try to influence them. I told him I wouldn't try to influence them any more than I would try to influence him, and I told him it was a shame that we had worked there so long and couldn't get together on it; then we went inside, he gave me the order, and he told me, "Don't forget about it." He said that if we voted for a strike, that we weren't going to be friends any more. The boys in the warehouse were going to lose the rapport that they formerly had with him.

Q Do you recall anything else that he said?

A No, not at this time.

Q Do you recall any mention of a card?

A Oh, he thought the cards were signed under duress, and I told him they weren't. I told him I signed mine freely, without any -- I was one of the first to sign it.

Q You told him you were one of the first to sign it?

A Yes. I signed it freely. I told him I believed in the idea.

Q Okay. Now I'll direct your attention to on or about September 8th, 1973. Did you attend a meeting that day at the Union Hall?

A Yes, I did.

Q Without going into great detail, what happened at the meeting?

A (No response)

Q Was there a vote taken?

A We took a vote to go on strike.

JUDGE CONSTANTINE: Did you hear what Dillenbeck had to say about that meeting?

THE WITNESS: Yes.

MR. BOOKSTEIN: May I have just a minute here, sir?

JUDGE CONSTANTINE: I'm trying to avoid unnecessary repetition.

(Pause)

MR. BOOKSTEIN: I would like to inquire, since I don't

see any allegation in the Complaint or the Bill of Particulars, Mr. Examiner, whether General Counsel contends there was anything unlawful about the September 5 conversation which Mr. Valerio just testified about with Mr. Isadore Tabachneck.

MR. SHERIDAN: Well, it's not alleged as 8(1), if that's what he means, but I certainly think it's relevant.

JUDGE CONSTANTINE: I'm not going to find 8(1), only on the question of anti-union animus, and I will allow it for that reason only.

MR. BOOKSTEIN: Fine.

JUDGE CONSTANTINE: All right. And to make this short, I'm going to ask him: Do you have anything to add, or didn't you hear anything that Mr. Dillenbeck said about this September 8th meeting? You were here yesterday?

THE WITNESS: Yes.

JUDGE CONSTANTINE: Did you hear what he said?

THE WITNESS: Yes, I heard what he said.

JUDGE CONSTANTINE: Do you have anything additional to say, or is that about right — I'm not saying —

THE WITNESS: That's about right, that's about right.

JUDGE CONSTANTINE: All right. Go on from there.

Q (By Mr. Sheridan) All right. Now, did you picket during the strike?

A Yes, I did.

Q And what time did you picket? What was your shift?

A Noon to 4:00.

Q Okay. Did you ever picket at any other time during the strike, other than that time?

A Yes.

Q What other times did you picket?

A Whenever anyone was going to be short on a shift, I would picket. I filled in for anyone who couldn't possibly make it.

Q And how many days did you picket during the strike?

A Seven.

Q During the whole strike -- were there any days that you did not picket while the strike was going on?

A Not to my knowledge.

Q Okay. Now during the strike and while you were picketing, did there ever come a time when Isadore Tabachneck came out to the picket line?

A Every day.

Q Once a day?

A At least four or five times a day.

Q And did he say anything when he came out?

A Yes, every time.

Q What did he say?

JUDGE CONSTANTINE: Again I'm going to ask him: Did you hear what Dillenbeck said about him?

THE WITNESS: Yes.

JUDGE CONSTANTINE: Do you have anything to add to that or detract from it? I'm not saying you have to believe what Dillenbeck said.

THE WITNESS: No, it was, in essence, the same.

JUDGE CONSTANTINE: Was it about the same?

THE WITNESS: He said we had ruined him, the business was done, he was going to padlock the place —

JUDGE CONSTANTINE: No. I'm asking you: Is your testimony —

THE WITNESS: It's the same as his.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) Now I'll direct your attention to on or about Friday, September 28th, the last day of the strike. Did Mr. Isadore Tabachneck — do you recall a conversation between you and he that particular day?

A Yes.

Q All right. Would you explain how this conversation came about?

MR. BOOKSTEIN: Excuse me, what date was this — I'm sorry, I didn't get that?

MR. SHERIDAN: September 28th.

Q (By Mr. Sheridan) Would you describe the conversation, how it came about, who was there —

A I was picketing in the morning for someone who couldn't

show up. I think Gle[illegible] was there, John Quigley, Ira Stockwell, and I think Dan Peasley was there, and Izzy came out and started shouting that I had been robbing him blind, he never knew he had a partner, that he didn't pay Glenn enough, if he paid Glenn --

Q Who's Glenn?

A Glenn Passino -- if he paid him twice what he paid him, it wasn't enough, he would take him back any time, but he said if he paid me three cents that was too much, and he repeated over and over again, he said, "I had a partner, I never realized it," and then some of the office clericals came out and he kept repeating the same things over again, only this time he eliminated mentioning my name, and he says, "You know who I'm talking about," he says, "I'm not mentioning any names," but, he says, "Somebody was robbing me blind, cleaning me out." At that time Luke Brunelle came out with Helen Schenck and one of the girls from the office and some other woman, I don't know who that was, and I told him, I says out of all the people he had on his damage desk, I was the only one who never used it for a shopping center, and I said, thanks for the appreciation, and he just puffed on his cigar and walked away.

JUDGE CONSTANTINE: Is this alleged in the 8(a)(1) -- as an 8(a)(1)?

MR. SHERIDAN: Well, I'm not done yet, your Honor --

yes — I'm not finished yet.

Q (By Mr. Sheridan) Is there anything else that you recall, Mr. Valerio?

MR. BOOKSTEIN: Wait a minute. If I may say so, I don't think that's a completely candid response to Mr. Examiner's question. If I read this Complaint correctly, that Paragraph (f) refers to some occasion involving Isadore Tabachneck, including September 28, with threats and reprisals, and Paragraph 6 (g), through that date, involves threats of closure, but there is nothing that I see in here that involves the conversation which Mr. Sheridan has just elicited. I think in those circumstances, in order to know whether I have an objection to address to you about it, I'm entitled to know the purpose of this line of testimony.

JUDGE CONSTANTINE: Is this part of the Complaint?

MR. SHERIDAN: Yes, your Honor. I'm not finished questioning him on this particular conversation yet.

MR. BOOKSTEIN: Well, certainly —

JUDGE CONSTANTINE: I understand but you're not — the only part of the conversation I'm interested in is that which you think constitutes a reprisal. So far there's no reprisal in there.

MR. SHERIDAN: Yes, but I'm not done yet, your Honor.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) How, Mr. Valerio, do you recall

anything else Mr. Tabachneck said?

A Yes.

Q What was that?

A He told me, he says, "You might as well leave," because he said, "You'll never get back in this place," he says, "over my dead body."

MR. SHERIDAN: We do allege that as 8(a)(1), your Honor.

Q (By Mr. Sheridan) Did you attend a meeting at the Union Hall on September the 29th?

A Yes, I did.

Q Were you here when Mr. Dillenbeck testified about that meeting?

A Yes, I was.

Q Do you recall anything differently than he did?

A Well, when he came back --

JUDGE CONSTANTINE: No, answer the question.

THE WITNESS: Yes, I do.

JUDGE CONSTANTINE: In addition to what he said?

THE WITNESS: Yes. He said that it would take seven to ten days to get the operation going.

MR. BOOKSTEIN: I don't think anything that was said at this Union meeting is binding on the Respondent, and I object to it as hearsay.

JUDGE CONSTANTINE: All right, I'll sustain the objection. Any action they took in the nature of a strike I've

ruled may go in.

MR. BOOKSTEIN: I have no objection to that.

JUDGE CONSTANTINE: But the discussions leading to the strike is not admissible. I'll sustain the objection. I think I did the same thing on Dillenbeck.

Just to shorten the hearing, was a strike vote taken? You don't have to agree with me that it was -- I'm asking it?

THE WITNESS: Yes.

JUDGE CONSTANTINE: It was. And do you know --

THE WITNESS: This meeting was to call off the strike.

MR. BOOKSTEIN: September 29 was the date that Mr. Sheridan inquired about.

JUDGE CONSTANTINE: A vote was taken to call off the strike?

THE WITNESS: Yes.

JUDGE CONSTANTINE: How did the vote come out?

THE WITNESS: They voted to call off the strike.

JUDGE CONSTANTINE: All right, that's it. I'm going to allow that much.

Q (By Mr. Sheridan) Now did there come a time after the vote when Mr. Dillenbeck spoke for the employees? Don't testify what he said.

A Yes.

Q As a result of that conversation, what, if anything, did you do on Monday, October the 1st?

A We all reported to work.

Q What time?

A 7:00 o'clock in the morning, the regular time.

Q And what happened when you got there?

A Izzy Tabachneck told us that we would have to go into the office four at a time to see Avrum Tabachneck, Personnel Manager.

Q And did you go in?

A Yes.

Q And what happened when you went in?

A When we went in, Avrum said that business was off right now, it would take seven to ten days to get things straightened out, and we would be hearing from him. He took our name and address on a piece of paper, and he made out the layoff slips for us.

Q Have you ever been recalled since?

A No.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: Pursuant to Section 102.118(b) of the Rules and Regulations, I would like to move, Mr. Trial Examiner, for the production of any and all statements which Mr. Valerio has furnished to Mr. Sheridan or his office.

JUDGE CONSTANTINE: Let's find out if he has any.

MR. SHERIDAN: Yes, your Honor. Let the record show

that I am turning over to Mr. Bookstein a statement from Mr. Valerio --

JUDGE CONSTANTINE: Let me see how long it is and I'll decide how long the recess should be.

MR. SHERIDAN: About five pages.

JUDGE CONSTANTINE: All right, a ten-minute recess.

MR. BOOKSTEIN: And this is the only statement from him?

MR. SHERIDAN: Yes.

(A ten-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Please proceed, Mr. Bookstein.

CROSS EXAMINATION

Q (By Mr. Bookstein) Mr. Valerio, from the time that you were involved, for the most part, with working at the damage desk, you were pretty closely involved among management people, with Isadore Fabachneck, weren't you?

A Yes.

Q And in that work-a-day relationship you came to know him, did you not?

A Yes, I did.

Q In addition to working at the Trading Port, did you also, while you were working there, occupy yourself as a part-time professional musician?

A Yes.

Q And did Izzy on occasion catch your act?

A Not to my knowledge.

Q Okay. Now, would it be fair to say, when, on September 28th, you had this conversation that you related, on the picket line in which Izzy said he never knew he had a partner and so forth, that that was a disturbing event to you?

A Decidedly.

Q All right. Prior to the occasion when that event that you testified about occurred, would it be fair to say that you knew Izzy to be a kibitzer?

A Yes.

Q He was -- he passed the time of day frequently, did he not?

A Yes.

Q And engaged in jokes?

A Yes.

Q And could tease at times, too?

A Yes, he could have.

Q Now you mentioned, too, the number of times a day that he crossed the picket line when it was there, did you not?

A Yes.

Q You're familiar, of course, with the geography at North Manning Blvd. and Prospect, are you not?

A Yes, I am.

Q And it's at that corner where the main entrance to the warehouse is, is it not?

A Yes.

Q So that in order to gain access to the warehouse or to leave it, Izzy would normally follow the route that would take him across the picket line, would he not?

A Yes.

Q And you were familiar, I suppose, with what was pretty much his daily routine in coming and going there, were you not?

A Yes, I was.

JUDGE CONSTANTINE: Well, I want to save a lot of cross examination by telling you that I'm not concerned and I'm not worried, and you shouldn't worry, about the fact that he crossed the picket line, or that he went, and if they're going to make anything of it, I will rule right now that it means nothing.

The question is, what did he say?

MR. BOOKSTEIN: I'm satisfied with your statement on that.

JUDGE CONSTANTINE: You may go into the conversation but the number of times is something you don't have to worry about. He can cross as often as he wants. I will draw no adverse interest.

MR. BOOKSTEIN: Fine.

Q (By Mr. Bookstein) Turning, then, to the conversation you related with Isadore Tabachneck following the September 5 meeting at which Sam Tabachneck spoke. In that conversation, did Isadore Tabachneck say to you in words or substance that what he wanted for everyone there was an election?

A I don't recall if he said election. He said he was fighting for our rights and his, as well.

Q Do you recall his mentioning that he wanted an election?

A At this time, I don't.

Q Mr. Valerio, I hand you what purports to be an affidavit. I call your attention to the last page and ask you if that's your signature?

(Document shown to witness.)

THE WITNESS: Yes, it is.

Q (By Mr. Bookstein) Would you please read Paragraph No. 5 to yourself, Mr. Valerio, not out loud?

A (Witness complies.)

Q I ask you now if that refreshes your recollection about whether in that conversation Mr. Isadore Tabachneck did not say that what he wanted was an election?

A Yes.

Q Did he say that?

A He said that.

Q And did he express to you in words or substance, his belief that an election rather than a strike was the preferable way to resolve the question of union representation?

A He said that he wanted an election. All he said about the strike was that if we did it, it would end all our friendship.

Q And did he say in that conversation that it would also result — did he say in words or substance in that conversation, it would also result in a loss of customers which would be damaging to both the Trading Port and the employees?

A I don't recall at this time if he said it then. He said it quite a few times before and after, but I don't recall right now if he said it then.

Q All right. Now, returning to the picket line conversation of September 28, which you described in your direct examination. You tell me at some point that Luke and Helen and another person came out and was present, correct?

A Yes.

Q And after Isadore Tabachneck made the remarks you described about your conduct as damage man, was it then, on the heels of that, that he said, in words or substance, you might as well leave because you'd never get back, or you'd get back over his dead body?

A I don't remember at what time he said it — whether they

were there or not. I only recall that he said it.

Q My question to you, though, is whether it was said in the same conversation that day, in which he had just commented adversely about your conduct as damage man?

A Yes.

Q So that the remark about your not coming back followed, as it were, on the heels of that criticism, did it not?

A Yes.

Q And you do not recall whether — at the time he said that you wouldn't come in unless it was over his dead body, you do not recall whether Luke or Helen or the other person was present; is that right?

A In all honesty, I don't.

Q Okay.

MR. BOOKSTEIN: That's all.

MR. SHERIDAN: I have some.

JUDGE CONSTANTINE: Go ahead.

MR. SHERIDAN: Oh, were you going to ask a question — I'm sorry.

JUDGE CONSTANTINE: No. I thought you didn't have any more and I was about to excuse the witness, but if you have redirect, go ahead.

MR. SHERIDAN: Yeah.

JUDGE CONSTANTINE: Just remember what I said yesterday about redirect. Whether there's objection or not, I would

see to it, because of the length of the hearing, that the redirect is proper redirect and it's not a repetition in going over the same ground as your direct. Go ahead.

REDIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Valerio, when, on September 28th, Isadore Tabachneck said to you that you would only come back over his dead body, did he say to you that he was only kidding or kibitzing?

A No, he didn't, and he didn't appear to be either.

Q And you haven't been called back?

A No, I haven't.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right, you may step down, Mr. Valerio.

(The witness was excused.)

MR. BOOKSTEIN: May the record show that I am now returning to Mr. Sheridan the affidavit he was kind enough to provide to us. Thank you.

(Document returned to Mr. Sheridan.)

MR. SHERIDAN: I call Donald Engel to the stand.

JUDGE CONSTANTINE: Before you go on, I've got to impose on your good nature. As I said yesterday, I didn't — we didn't have the word "kibitzer" when I took Latin in college. This is the second witness who's used the phrase "kibitzer" to describe this gentleman. Would someone educate

me and tell me what "kibitzer" means?

MR. BOOKSTEIN: Well, at this point, sir?

JUDGE CONSTANTINE: I don't care when you educate me.

MR. BOOKSTEIN: All right, at some point I will. In fact, I was prepared to this morning but I left the reference I wanted to bring in at home.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: There's a lexicon that explains it rather well.

JUDGE CONSTANTINE: Who's the next witness?

MR. SHERIDAN: Donald Engel.

JUDGE CONSTANTINE: Is that E-n-g-e-l or g-l-e?

MR. SHERIDAN: g-e-l.

Whereupon,

DONALD ENGEL

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please give your name and address for the record.

THE WITNESS: Donald Engel. I live at Building 11, Apartment 10, Leisureville Apartments, Watervliet, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Engel, did you ever work for Trading Port, Inc.?

A

A Yes, I did.

Q When did you first work for them?

A I started in, I believe, September of '65 or '66 in the stores. My full time goes from June, '68.

Q You started in the warehouse in June of '68?

A In the warehouse.

Q Okay. And what were your duties in the warehouse -- what jobs did you do in the warehouse?

A I was principally a forklift operator. I did every other job, other than a supervisor's, in the warehouse.

Q Now I'll direct your attention to on or about August 29th. Did you attend a meeting at the Union Hall?

A Yes, sir, I did.

Q Did you sign anything at that meeting?

A Yes, I did. I signed a Union's place cards.

Q All right. Following the meeting, at work, did you have any conversations with any employees about Union cards?

A I told them that --

MR. BOOKSTEIN: Well, I think that question should be answered "yes" or "no", Mr. Examiner.

JUDGE CONSTANTINE: All right.

THE WITNESS: Yes.

Q (By Mr. Sheridan) And what did you tell them?

MR. BOOKSTEIN: I object to that.

JUDGE CONSTANTINE: I sustain that, but I will allow

a question to indicate what did he do, did he solicit or not.

Did you do any soliciting for the Union?

THE WITNESS: No.

JUDGE CONSTANTINE: All right. I will allow you to show Union activity but not his words. All right.

Q (By Mr. Sheridan) Well, were these conversations in any way related to Union organization?

A Yes.

MR. SHERIDAN: I don't know how to ask him other than to ask him questions that do indicate --

JUDGE CONSTANTINE: All right. In other words, you talked about the Union to other employees?

THE WITNESS: Yes, sir.

JUDGE CONSTANTINE: All right. The conversation I don't want. I just want to know whether you did. I'm not saying you did. You're under oath and you have to tell the truth.

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) Well, could you just state basically what the substance of the conversations were?

MR. BOOKSTEIN: Well, I object to that, that's hearsay.

JUDGE CONSTANTINE: I'll sustain that objection. The fact that he talked to employees in favor of the Union is admissible. You may ask him how many he talked to if you

want to show extensive Union activity, although I don't think that's necessary.

Q (By Mr. Sheridan) To your knowledge, who at the plant passed out Union cards?

A Jim Dillenbeck, Farley Riddick, Jimmy Houck.

Q Did your conversation with the employees in any way relate to this?

A Yes.

Q All right, I'll direct your attention to on or about September 5th, 1973. Did you attend a meeting at the warehouse?

A Yes, I did.

Q Who, if anybody, spoke for the Company?

A Sam Tabachneck.

Q And what did he say?

A He said that he knew that there was going to be a meeting at the Union Hall, that if we voted for a strike, it was going to hurt everybody involved, it's going to hurt him, it's going to hurt us, and it's going to hurt a lot of people who wouldn't have a vote. He had a lot of office help out there and he gestured with his hands towards those -- you know, the office clericals.

Q Now I'll direct your attention between September 4th and September 7th of 1973. Did you have any conversations during that period of time with William Brunelle?

A Yes, I did.

MR. BOOKSTEIN: I'm sorry, I missed the date.

JUDGE CONSTANTINE: September 4th to September 7th.

MR. BOOKSTEIN: Thank you.

Q (By Mr. Sheridan) And how many conversations did you have with him?

A Approximately half a dozen conversations.

Q All right. Now at that time what job did Mr. Brunelle have?

A He was a buyer in the warehouse.

Q And what were his duties?

JUDGE CONSTANTINE: I thought you gentlemen stipulated he was a supervisor.

MR. BOOKSTEIN: That's from October 3, sir.

MR. SHERIDAN: Since October -- he had a different job.

JUDGE CONSTANTINE: Oh, all right.

Q (By Mr. Sheridan) What was his job at this time?

A He was a buyer.

Q Are you familiar with his duties?

A To some degree.

Q And how are you familiar with his duties?

A Occasionally I used to do some jobs for him, like checking unit prices on new items and old items that were changed. I used to go through and do the inventory for him

occasionally.

Q All right. And what were his duties?

A His duties were to buy stock, check the inventories, check prices on stock.

Q And how is it that you came to work with him?

A If I didn't have enough on my own job to do, I occasionally would stop in and ask him if he had anything that he needed done, or sometimes he would stop me in the warehouse and tell me if I had some free time, he had a job for me to do.

Q And when he would ask you to go in, would you go in?

A Yes, sir.

Q And when you went in, how would you know what you were supposed to do?

A Luke would explain everything to me, exactly what had to be done, what particular job it was.

Q And what were these jobs that you did?

A They were mostly checking on changes in package size on the items that he bought.

Q Were there any forms to be filled out?

A Not per se', no. He took care of that himself.

Q Did Mr. Brunelle meet with anybody in the course of his duties?

JUDGE CONSTANTINE: Well, now you're leading. This is a crucial matter.

MR. BOOKSTEIN: Yes. I do object on that basis.

JUDGE CONSTANTINE: I want to know from this own man's knowledge, not something that you put in his mind.

Q (By Mr. Sheridan) Would you describe more extensively what he did, if you know?

A Okay. He would purchase, or order, stock from the salesmen.

Q How would he order it?

A The salesmen would come in.

Q Salesmen from where?

A From the various companies. Now the exact companies that he ordered from, I'm not sure of.

Q You say they would come in?

A Right. They would come in and he would order through those people.

Q Do you know how he would order it?

JUDGE CONSTANTINE: Not guess work -- do you know?

THE WITNESS: Well, he would write up the order for whatever stock we need, and if it was a large order, he would always clear it through Sam Tabachneck.

Q (By Mr. Sheridan) Do you know how large it had to be before he had to clear it?

A No, I don't.

Q And do you know who, if anybody, supervised him when he was a buyer?

A Sam Tabachneck, if anybody.

Q And that's the vice president of the Company?

A He is.

Q Now did Mr. Brunelle have an office?

A He didn't have an office as such. He had a desk.

Q And where was the desk located?

A The desk was located in a room with the other buyer's desk, with Mr. Solomon's desk, too; three desks in one room outside the computer room.

Q At that time, what was Mr. Solomon's job?

A Mr. Solomon was warehouse superintendent.

Q Do you know whether or not that was the job that Mr. Brunelle ultimately obtained?

MR. BOOKSTEIN: I think we stipulated to that this morning.

MR. SHERIDAN: Okay.

Q (By Mr. Sheridan) Do you know -- let me ask you this: When Mr. Brunelle came to work, what type of clothes did he wear?

A Suit coat and tie.

Q And did the warehouse employees wear the same clothes?

A No, they didn't, most of them were in dungarees.

JUDGE CONSTANTINE: I know college guys who wear dungarees.

MR. BOOKSTEIN: I bet the salesmen wore suit coats and

ties, too.

JUDGE CONSTANTINE: I'm not going by what they wore.

Q (By Mr. Sheridan) Do you know whether or not Mr. Brunelle punched a time clock?

A I don't believe he did.

JUDGE CONSTANTINE: Well, do you know?

THE WITNESS: He told me on several occasions, sir, that he didn't have to worry about the time. He'd come in later in the morning.

JUDGE CONSTANTINE: In other words, you don't know, you're just taking his word for it?

THE WITNESS: Right, taking his word for it.

Q (By Mr. Sheridan) All right. Do you know whether or not Mr. Brunelle was on salary?

A Again, I'd be taking his word for it.

Q Did he ever tell you?

A Yes, he did.

Q Do you know, prior to being a buyer, whether Mr. Brunelle ever had any other job?

A Yes.

MR. BOOKSTEIN: I object to this as neither material or relevant, the testimony being on --

JUDGE CONSTANTINE: The question is --

MR. BOOKSTEIN: -- that on -- between September 4 and 7, he was a buyer.

JUDGE CONSTANTINE: I'll sustain the objection.

MR. SHERIDAN: This obviously goes to Mr. Brunelle's position when he got this job.

JUDGE CONSTANTINE: I want to know what his job was between the 4th and the 7th, that's what you're asking him. I don't care what his prior jobs were. He may have been president of the company for all I know and then got demoted.

Q (By Mr. Sheridan) When you worked with Mr. Brunelle, did anyone else give you any work assignments?

MR. BOOKSTEIN: Well, I object to the question in that form, and I do think we're in an area where Counsel should not lead the witness.

JUDGE CONSTANTINE: I think it's leading. I'll sustain the objection.

Q (By Mr. Sheridan) When you worked with Mr. Brunelle, who, if anybody, told you what to do?

MR. BOOKSTEIN: I do think, in view of the objection having been sustained, Mr. Sheridan should pass to another subject and then return to this.

JUDGE CONSTANTINE: I can't help that. I think it's a good point but I still have to go by the rules of evidence. I'll have to overrule your objection.

Q (By Mr. Sheridan) Who, if anybody, told you what to do when you were working with Mr. Brunelle?

A Just Mr. Brunelle when I was working with him.

Q After you were working with Mr. Brunelle, after you did whatever work you did, what, if anything, happened to that work?

A I would take it in to him and he would check it, and then if I done something wrong, he would explain, you know, that I had done it backwards or something, and then he would take it and make out the proper forms for it.

Q Now I'm going to go back to the original question I asked you. You've already testified that between September 4th and September 4th, on about six occasions you had conversations with Mr. Brunelle. Where were these conversations?

A These conversations were all held within the warehouse.

Q Was anyone present during any of these conversations?

A On two occasions, one time Glenn Passino was there, another time Glenn Passino and Thomas Broderick were there.

Q All right. Now, were these conversations with Mr. Brunelle the same or different?

A Basically, they were the same. They all had to do with the Union.

Q And what did he say?

MR. BOOKSTEIN: I object to the question on the grounds, Mr. Examiner, that no proper foundation has been laid here. There is a complete absence of proof sufficient to justify

the inference that between September 4 and September 7 Mr. Brunelle was a supervisor.

JUDGE CONSTANTINE: All right, I'll sustain the objection. I don't think there's enough here to show that he was a supervisor, but you may make an offer of proof. In view of the fact that the witness has said it was about the same each time, one offer of proof is sufficient; you don't have to ask him any more.

MR. SHERIDAN: Well, I'd like to ask him a couple of other questions before --

JUDGE CONSTANTINE: Go ahead.

Q (By Mr. Sheridan) Now during any of these conversations that you had with Mr. Brunelle, did anyone walk by or come within -- near the conversation?

MR. BOOKSTEIN: I don't see the relevancy or materiality --

JUDGE CONSTANTINE: I'll allow it subject to connection. So far, I don't either, but I can't rule at the present time. I'll entertain the motion to strike.

Q (By Mr. Sheridan) Did anybody?

A Yes, on one particular time. It was a long conversation, about a half hour conversation. Mr. Solomon, the warehouse superintendent, came by twice. The first time he came by, I started to move and go back to work, and Luke said to me--

MR. BOOKSTEIN: Now wait a minute. I object to anything

that was said by Mr. Brunelle to Mr. Engel on the grounds that it has not been established that Mr. Brunelle is a supervisor on the date in question.

JUDGE CONSTANTINE: I think they're trying to show that this other gentleman -- what's his name?

MR. SHERIDAN: Mr. Solomon.

JUDGE CONSTANTINE: -- Mr. Solomon was present, but I don't think that's enough to show that he adopted their statements.

MR. BOOKSTEIN: But the conversation the witness was about to relate was a statement, if I heard him correctly, by Mr. Brunelle, not by Mr. Solomon.

JUDGE CONSTANTINE: I understand that. In the presence of Solomon, I still don't think that's enough.

MR. BOOKSTEIN: I would object to that as neither material or relevant.

JUDGE CONSTANTINE: I sustain the objection. It isn't a question of relevance. It's a question of adopting or ratifying a statement of someone who has spoken. I don't think that Solomon, by merely being there, ratifies what Brunelle said. If that's the case, then Brunelle might say that Solomon owes him $1500 and by keeping quiet Solomon ends up owing him money. I don't believe that. Silence, under these circumstances, is not ratification, I'm so ruling, but I'm going to let you make an offer of proof.

MR. SHERIDAN: Could I just point one thing out before this, your Honor? Yesterday, in connection with Mr. Brunelle, you ruled that the original Answer filed by Respondent was a declaration against interest. In that Answer they admitted that Mr. Brunelle, in both his capacity as buyer and warehouse manager, would all times supervise within the meaning of the Act.

JUDGE CONSTANTINE: Maybe so but I'm going to exclude it today. You make an offer of proof.

MR. SHERIDAN: I just want to point out that under the New York State rules, this would constitute an informal judicial admission, the fact that the Answer had been filed at that time.

JUDGE CONSTANTINE: I'll adhere to my ruling in sustaining the objection.

MR. SHERIDAN: Yes, I would like to make an offer of proof.

JUDGE CONSTANTINE: Go ahead. And this is for all six conversations?

MR. SHERIDAN: Yes, right.

JUDGE CONSTANTINE: Because he has testified they were about the same.

MR. SHERIDAN: Yes. I'd like to make an offer of proof that if Mr. Engel were permitted to testify, he would testify that in these conversations Mr. Brunelle on one or

two occasions said that Sam Tabachneck wanted to know why the men wanted the Union, and that Engel replied that everyone had different reasons for wanting the Union. Brunelle asked him if this could be settled possibly by Company union in place of Local 294; Mr. Engel replied it couldn't; Mr. Brunelle said no one in the office knew exactly what was going to happen but there was a distinct possibility that they might sell or close if the Union did get in. Mr. Brunelle said that possibly the employees could select three men to go in and talk with Sam Tabachneck and possibly they could come to some agreement, and that on two occasions, while Mr. Engel was talking with Mr. Brunelle, warehouse manager Robert Solomon walked by. Mr. Engel started to leave, at which time Mr. Brunelle said that Solomon knew what he was doing and won't say anything to him; that one such conversation lasted from 30 to 40 minutes, and it is unusual that an employee will be permitted to talk for that length of time without doing work at the plant.

That's the end of my offer of proof.

JUDGE CONSTANTINE: All right. May I ask a question, subject to objection by anybody: This man said he signed a card. Is it one of those which is in evidence?

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) All right, I'll direct your attention

to on or about September 8, 1973. Did you attend a meeting at the Union Hall that [illegible]?

A Yes, I did.

Q Without going into great detail, what happened at the meeting?

A Everybody present voted for a strike.

Q And then was there a strike?

A Yes, there was.

Q And —

JUDGE CONSTANTINE: Why don't we get us a stipulation that there was a strike? Is there any question, because he's been asking the witnesses — I can't stop him —

MR. BOOKSTEIN: If Mr. Sheridan wants it — to break to put together a proposed stipulation on these matters, I'm sure we'd find ourselves able to do away with this testimony.

JUDGE CONSTANTINE: That's another matter. I'm interested now in trying to avoid any more proof of a strike. It seems to me that it's pretty nearly established that there was a strike. Will you stipulate that there was a strike?

MR. BOOKSTEIN: I will so stipulate.

JUDGE CONSTANTINE: All right. Go ahead.

MR. SHERIDAN: And that it lasted from on or about — well, on September 9th at midnight until September 28th.

JUDGE CONSTANTINE: Well, I don't care if you stipulate to that. He did ask this witness if there was a strike, and the witness said "yes." I'm trying to avoid further questioning of that.

MR. BOOKSTEIN: If it will satisfy Mr. Sheridan, I'm prepared to stipulate that from the time the business opened at its normal hour on --

JUDGE CONSTANTINE: September 9.

MR. BOOKSTEIN: -- September 10, Monday, September 10, until it opened at its normal hour on Monday, October 1 there was a strike.

JUDGE CONSTANTINE: Is that agreeable to you, Mr. Sheridan?

MR. BOOKSTEIN: Whether there was some activity, you know, earlier, at the opening of our business on Monday, September 10, that might well be.

MR. SHERIDAN: Well, I -- as far as the beginning date, I would have no problem with that but --

JUDGE CONSTANTINE: September -- all right, let's stipulate that much, that the strike started September 10th?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: All right, but you can't agree as to when it terminated?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: All right, then, that much is a

stipulation. You don't have to put in any more —

MR. BOOKSTEIN: Can we go off the record for a moment?

JUDGE CONSTANTINE: All right, off the record.

(Discussion off the record.)

JUDGE CONSTANTINE: On the record.

I think there's a stipulation you want to read into the record, Mr. Sheridan.

MR. SHERIDAN: Yes. The stipulation is that, in addition to what we've already stipulated to, that the strike ended on Saturday, September 29th.

MR. BOOKSTEIN: It is so stipulated.

JUDGE CONSTANTINE: And it started on September 10th?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: All right, that's a stipulation.

Q (By Mr. Sheridan) Now, Mr. Engel, did you picket at any time during the strike?

A Yes, sir.

Q And how many days did you picket?

A Every day of the strike.

Q And what hours did you picket?

A 8:00 a.m. to 12:00 noon.

Q Now at any time while you were out there picketing, did you see Mr. Isadore Tabachneck at the picket line?

A Yes, I did.

Q How often?

A About every day.

Q Once a day?

A Usually once, sometimes twice a day.

Q All right. Did he say anything to you?

A On one particular instance he told me that after all this was over we could go visit him at his condominium down in Florida. He made the statement that we'd never get back in, he couldn't deal with us while we were still out in the street.

Q He said he wouldn't deal with you while you were still out in the street?

A Right.

Q Now did you attend a meeting on September 29th, 1973 at the Union Hall?

A Yes, I did.

Q Did there come a time during that meeting when anybody left to go someplace?

A I believe after the meeting the Union representatives went down to talk to the representatives from the Trading Port — who was present at the meeting, I really don't know.

Q All right. And did there come a time when anyone returned who had left?

A The Union representatives did come back, yes, sir.

Q And did they speak to the employees?

A Yes —

MR. BOOKSTEIN: Well, I object to anything they said.

Q (By Mr. Sheridan) Not what they said.

JUDGE CONSTANTINE: As a result of what they said, what happened — is that what you want to know?

MR. SHERIDAN: Yes, your Honor.

Q (By Mr. Sheridan) As a result of what they said, what, if anything, did you do on Monday, October 1?

A On Monday, October 1st, we reported for work at the normal time, 7:00 o'clock in the morning.

JUDGE CONSTANTINE: Let me ask this, please: Can it be stipulated that they all reported for work — there's some evidence — I'm not saying I'm crediting it, but if it isn't serious, why don't you stipulate to it?

MR. BOOKSTEIN: There is an admission in the Answer —

JUDGE CONSTANTINE: See, I don't have the Pleading —

MR. BOOKSTEIN: Yeah.

JUDGE CONSTANTINE: — before me.

MR. BOOKSTEIN: There's an admission in the Answer —

JUDGE CONSTANTINE: That they reported for work?

MR. BOOKSTEIN: — with a couple of exceptions to the Complaint's allegation, they all reported in on October 1st.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: And there were —

JUDGE CONSTANTINE: Well, will you tell me what those

two exceptions are so you will only have to put in evidence on that, if he wants to, I'm not saying that's so. Maybe you'll agree that all but two reported. He's stipulating that all but two reported —

MR. BOOKSTEIN: I didn't say two — there were a few.

JUDGE CONSTANTINE: Oh, all but a few.

MR. BOOKSTEIN: There were a few. I don't recall how many but there were subsequent offers to return. I could make the comparison and perhaps isolate those who —

JUDGE CONSTANTINE: All right, let's go off the record while you do that. That will save a lot of trouble.

MR. SHERIDAN: In a couple of minutes I'll be almost done with him.

JUDGE CONSTANTINE: I know, but you're going to put on other witnesses, that they were also —

MR. SHERIDAN: Yes. I mean — I was just suggesting that possibly we could finish with this witness and then do it.

JUDGE CONSTANTINE: And then stipulate?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: All right. You were one of those who reported on October 1st?

THE WITNESS: Yes, I was.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) And what happened when you reported?

A We were told to wait outside.

Q Told by whom?

A Avrum Tabachneck and Izzy Tabachneck. They told us to come in, in groups of four to five. We went inside and --

Q Do you recall who was with you?

A Not exactly, no, I don't.

Q All right. What happened when you went in there?

A We went in. Avrum Tabachneck took our names, our addresses, our phone numbers, and he made a layoff slip for us.

MR. SHERIDAN: Nothing further, your Honor.

MR. BOOKSTEIN: Mr. Examiner, do you wish us to address ourselves to the question of who came in October 1st, or do you wish me to conduct my cross examination?

JUDGE CONSTANTINE: I leave that to you. Do you want a short recess to see if you can stipulate as to who came back on October 1st? He's willing to stipulate that nearly everybody came back. If you agree with that, that's one thing, and if you don't, you can agree with that subject to the right to introduce evidence as to others whom he doesn't agree returned. Do you want to take a recess for that purpose?

MR. SHERIDAN: Well, I just thought that possibly we could finish with Mr. Engel. He has to return --

MR. BOOKSTEIN: All right, fine, I'll be happy to

accommodate him.

JUDGE CONSTANTINE: All right, go ahead.

CROSS-EXAMINATION

Q (By Mr. Bookstein) Mr. Engel, did you give a statement to a representative of the Board?

A Yes, I did, sir.

Q One or more than one statement?

A One statement.

MR. BOOKSTEIN: I would move that that statement be produced for my use at this time.

MR. SHERIDAN: Yes, your Honor. Let the record show that I am turning over to Mr. Bookstein a statement from Mr. Engel — the only one we have — of about 10½ pages, handwritten.

JUDGE CONSTANTINE: All right, but that's handwritten?

MR. SHERIDAN: Yes, it will take a little longer.

JUDGE CONSTANTINE: No, a ten-minute recess.

(A ten-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Go ahead with your cross-examination, please.

MR. BOOKSTEIN: Yes, sir.

Q (By Mr. Bookstein) Isn't it a fact, Mr. Engel, that when Sam Tabachnock addressed the group of employees on September 5 he had some papers in his hand?

A I don't remember.

Q Do you remember that one of the persons present, when that speech was made, was Walter Snyder?

A Yes, I do.

Q And isn't he, in fact, the individual who you have described to the Board as "the guy on the computer?"

A Correct.

Q And also isn't it a fact that a girl named Debbie was there?

A Yes.

Q And you knew her to be a key punch operator?

A She worked on the computer. Exactly what her job was, I'm not that familiar.

Q Okay. That event, when Sam Tabachneck addressed the employees, lasted what, about fifteen minutes?

A Approximately, yes.

Q Now is it fair to say that almost a hundred percent of your time when you worked was spent on the forklift?

A Yes.

Q And that a very minor percentage of your time was spent working in connection with Mr. Brunelle?

A Correct.

Q And that, in fact, Mr. Brunelle had no employees under him?

A Correct.

Q And that if Mr. Brunelle wanted you to work with him,

and your other duties precluded it, Mr. Solomon would overrule that?

A That's right.

Q Do you recall whether, when Mr. Tabachneck -- Isadore Tabachneck -- extended his invitation to visit him in his condominium, he also mentioned that he personally was on the verge of retirement?

A No, he didn't.

Q Did there come a time, Mr. Engel, in your operation of a forklift, when you operated it in some unusual attire?

MR. SHERIDAN: Objection, your Honor, I don't think that has anything to do with the case at all.

JUDGE CONSTANTINE: In order to pass on the objection, I'll have to ask, what's this offered for? I don't quite see its relevance.

MR. BOOKSTEIN: It will bear later on the basis for Respondent's not having, to this point at least, re-employed Mr. Engel.

JUDGE CONSTANTINE: I think that's part of your affirmative proof. You're going beyond the direct. I'll sustain the objection, without prejudice to your bringing it out as part of your case.

MR. BOOKSTEIN: All right.

Q (By Mr. Bookstein) Did there come a time, Mr. Engel, during the course of this strike when you made the state-

ment that you wouldn't come back to the Trading Port with or without a union?

A No.

JUDGE CONSTANTINE: You know that's a close question there, even though no one objects, as to whether it's part of this case or part of subsequent proceedings, assuming I find a violation and whether he should be reinstated.

MR. BOOKSTEIN: I agree it's —

JUDGE CONSTANTINE: I haven't done anything. I say that's a close question.

MR. BOOKSTEIN: And I value your discretion.

JUDGE CONSTANTINE: It's in because there's no objection. I would have been, really, on the spot if someone had an objection. I don't know how I would have disposed of it. Go ahead.

MR. BOOKSTEIN: I have no further questions of Mr. Engel.

JUDGE CONSTANTINE: Is there any redirect?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: All right. You may step down, Mr. Witness.

THE WITNESS: Thank you.

(The witness was excused.)

JUDGE CONSTANTINE: Is this a good time to ask you gentlemen to decide whether you want a short recess on the

stipulation as to how many offered to return to work on October 1st? I don't think you're far apart on the stipulation.

MR. BOOKSTEIN: That would be fine, and I would like the record to show at this time that I'm returning Mr. Engel's affidavit to Mr. Sheridan.

JUDGE CONSTANTINE: All right, the record may show that.

(Document returned to Mr. Sheridan.)

JUDGE CONSTANTINE: I don't like to waste too much time on it. If you can't stipulate, you can't, but perhaps you can at least partially stipulate that nearly all came on October 1st and then let the General Counsel put in evidence as to the ones you can't agree on. I'm only going to declare a very short recess.

MR. BOOKSTEIN: It shouldn't take very long.

JUDGE CONSTANTINE: A five-minute recess at the most.

(A five-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Have you gentlemen been able to stipulate?

MR. BOOKSTEIN: To some extent, and on Respondent's behalf, I would propose the following stipulation, if I may: That of the individuals enumerated in Schedule A, annexed to the Complaint, and alleged by Paragraph 9 of the Complaint, to have made unconditional offers to return on or about October 1, 1973, we would stipulate that the following

18 named individuals did make those offers on October 1: Charles Ballou, Thomas Broderick, Gary Deyss, James Dillenbeck, Donald Engel, Frank Houck, Jr., James Houck, Richard O'Toole, Glenn Passino, Donald Peasley, Jr., Fowler Riddick, John Robinson, Robert Robinson, William Savage, Michael Scanlon, James W. Sim, Jr., Ira Stockwell, and Raymond Valerio.

And we would further stipulate that with respect to the eight remaining unnamed individuals on Schedule A, we shall endeavor at a subsequent point to come up with a further stipulation for the record, and if we're unable to, we will rely on the proof as to those eight, concerning when and if offers to return to work were made.

JUDGE CONSTANTINE: Is that agreeable to you, Mr. Sheridan?

MR. SHERIDAN: Yes, your Honor, I so stipulate. I believe I stated off the record, but so that it appears on the record, our position is that the offer that was made by the Union on September 29th —

JUDGE CONSTANTINE: I understand, but this is as to who actually showed up on October 1st?

MR. SHERIDAN: Right, yes.

MR. BOOKSTEIN: That, I understand, to be a legal position. I'm talking now about the factual presentation of return.

JUDGE CONSTANTINE: Do you join in that stipulation, Mr. Pozefsky?

MR. POZEFSKY: Yes, I do.

JUDGE CONSTANTINE: All right, that will be accepted and become a part of the record.

Do you rest or do you have more witnesses?

MR. SHERIDAN: No.

(Laughter)

JUDGE CONSTANTINE: Please note that everybody is smiling in here.

MR. SHERIDAN: General Counsel calls John Biernik to the stand.

JUDGE CONSTANTINE: Will you please spell his last name, please?

MR. SHERIDAN: B-i-e-r-n-i-k.

Whereupon,

JOHN BIERNIK

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please let us have your name and address for the record.

THE WITNESS: John Biernik, RD #1, Averill Park.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Biernik, did you ever work for

Trading Port, Inc.?

A Yes, I did.

Q And when did you first start working for them?

A In '67.

Q 1967?

A '67 or '68.

Q Do you have any other job?

A Yes, I do.

Q And what is that?

A I work for the Albany Fire Department.

Q Now prior to the strike, what was your job at the Trading Port?

A Order selector.

JUDGE CONSTANTINE: A what?

THE WITNESS: An order selector. That was the main thing. I was --

JUDGE CONSTANTINE: Okay, that's good enough -- just to get a brief idea.

Q (By Mr. Sheridan) And how many hours a week did you work?

A 36 - 38.

Q Now, did you ever sign any card for the Union?

A Yes, I did.

JUDGE CONSTANTINE: Is that in evidence?

MR. SHERIDAN: Yes, it is, your Honor.

JUDGE CONSTANTINE: Then why ask him, then. I'm going to read the record -- everything's in evidence.

Q (By Mr. Sheridan) Were you one of the employees who went on the strike?

A No, I didn't go out.

JUDGE CONSTANTINE: I can't hear you -- you did not go out on strike?

THE WITNESS: No, I didn't strike, no.

Q (By Mr. Sheridan) Did you picket?

A No, I didn't picket.

Q On or about September 9th, did you cease working at the Company when the other employees did?

A That's right.

Q After the strike ended, did there come a time when you had a conversation with any Company official about going back to work?

A Yes, a couple of times.

Q When was the first time?

A Oh, it had to be -- well, the first time I talked to anybody was the day after the -- the day after that everybody got their layoff slips.

Q You weren't there that particular day, were you?

A No, I wasn't.

JUDGE CONSTANTINE: Are you referring now to October 1st?

MR. SHERIDAN: Right, that's October 1st.

JUDGE CONSTANTINE: I just want to be sure I can follow the testimony.

Q (By Mr. Sheridan) And you say it was the following day, which would be October 2nd?

A Right.

Q And who did you speak with?

A I saw Izzy Tabachneck outside the building.

Q All right. And what was the conversation?

A I came over and I asked him about -- if I was supposed to get a pink slip because I heard everybody else did, and he says, no, you don't, you're only part-time, because there wasn't any, and that was it.

Q There wasn't any what?

A "Any pink slip for you."

Q Was there any discussion about going back to work?

A He said that --

MR. BOOKSTEIN: Well, I think Counsel should not lead the witness on the conversation.

JUDGE CONSTANTINE: I agree with you, but I don't think that's quite leading -- it's a borderline course. He isn't putting anything in his mouth, so I'll allow it.

Q (By Mr. Sheridan) Was there any discussion about going back to work?

JUDGE CONSTANTINE: Just "yes" or "no", was there?

THE WITNESS: No.

JUDGE CONSTANTINE: All right, that takes care of that.

Q (By Mr. Sheridan) Did you start to work that day?

A No, I didn't.

Q Did there come a time when you did return to work?

A Yes.

Q And when was this?

A I don't remember the exact date.

Q Well, about how long after the strike ended?

MR. BOOKSTEIN: If it helps, Mr. Sheridan, we're prepared to stipulate Mr. Biernik returned to employment on 11/19/73.

Q (By Mr. Sheridan) Is that the correct date?

JUDGE CONSTANTINE: About November 19th?

THE WITNESS: Yeah, it had to be somewhere around there.

JUDGE CONSTANTINE: Is that a stipulation?

MR. BOOKSTEIN: I offer it if he wants it.

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: Well, it's up to Mr. Pozefsky and Mr. Sheridan. November 19th he returned to work, is that agreeable to you?

MR. SHERIDAN: Yes.

MR. POZEFSKY: Yes, it is.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) How did it come that you went back to

work?

A Well, I stopped into the warehouse to see how things were going.

Q And how long was this prior to when you actually went back?

A Oh, it must have been four or five weeks, something like that.

Q Four or five weeks before you went back?

A Right. It was a week after that I first saw Izzy Tabachneck that I first went over to the warehouse to see if I could get my job back.

Q All right. And who did you speak with this time?

A I saw Luke -- Luke Brunelle.

Q All right. What was the conversation with him?

A How are things going, you know, what's the chance of getting back.

Q And what did he say?

JUDGE CONSTANTINE: Is this Brunelle?

MR. SHERIDAN: Brunelle, yes. I believe it's been testified to that he's referred to as Luke.

JUDGE CONSTANTINE: Okay. I want to be sure.

THE WITNESS: That things are slow.

Q (By Mr. Sheridan) Did you have any subsequent conversations with anyone from the Company prior to going back to work?

A I talked to Avrum Tabachneck.

Q And when was this?

A This had to be ---

JUDGE CONSTANTINE: If this is an attempt to show that he made a reasonable effort, that is not part of this case. I'm trying to shorten your testimony. If it is to show that he had a conversation during which some 8(a)(1) statements were made, that's different.

MR. SHERIDAN: No.

JUDGE CONSTANTINE: But at this point I'm not going to pass on the question of whether he made a reasonable effort or not. That's part of the compliance question.

MR. SHERIDAN: Yeah. I just want to get in how he got back to work.

JUDGE CONSTANTINE: Well, he says he talked to them and then finally went back on 11/19.

MR. SHERIDAN: All right, but how did he come to go back?

JUDGE CONSTANTINE: That's not an issue in the case.

Q (By Mr. Sheridan) Who talked to you from the Company about going back prior to when you actually went back?

A Avrum Tabachneck.

Q All right, and what did he say?

A Well, I talked to him twice.

Q All right, what did he say on these occasions?

A The first one was "Things are slow. I couldn't help you out right now. We'll see, maybe in the future." He was more or less putting me off.

Q What about the second conversation?

A He said he talked to other people in the warehouse and said that I was a very capable worker, and that at the first opportunity he would hire me back.

Q All right. And then did he hire you back?

A Yes, he did.

Q What, if anything, did he say about your employment when he hired you back as to what -- how much you would be working?

A He said I'd be limited to 30 hours a week.

Q Is that less hours -- and how many hours have you worked since you've been back, a week?

A I haven't approached 30 hours yet -- well, I might have, I might have hit 30 hours and I hit 36 but it hasn't averaged out to 30 hours.

Q And what is your job now?

A I'm strictly an order selector.

Q Was there any change in your wage rate from when you worked prior?

A No, it stayed the same.

Q By the way, did you ever have any hospitalization insurance when you were working there?

A No.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: Mr. Biernik, did you at any time give any representative of the National Labor Relations Board a signed statement?

THE WITNESS: No, I didn't.

MR. BOOKSTEIN: No cross examination.

JUDGE CONSTANTINE: All right, you may step down, sir.

(Witness was excused.)

MR. BOOKSTEIN: May we go off the record?

JUDGE CONSTANTINE: Off the record.

(Discussion off the record.)

(Whereupon, at 12:15 p.m., the hearing was recessed, to reconvene at 1:15 p.m. the same day.)

AFTERNOON SESSION

1:15 p.m.

JUDGE CONSTANTINE: On the record.

Please proceed, Mr. Sheridan.

MR. SHERIDAN: General Counsel calls James Houck to the stand.

JUDGE CONSTANTINE: Can you spell the last name for me, please?

MR. SHERIDAN: H-o-u-c-k.

Whereupon,

JAMES HOUCK

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Give your name and address for the record, please.

THE WITNESS: My name is James Houck and I live at 704 Clinton Avenue, Albany, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Houck, did you ever work for Trading Port, Inc.?

A Yes, I did.

Q When did you start working for them?

A September 19th, '65.

Q And what was your job?

A At the time I started or —

Q No, at the time you last worked there.

A Machine operator and receiver.

Q I'll direct your attention to on or about August 29th, 1973, did you attend a meeting at the Union Hall?

A Yes, I did.

Q Now did you sign anything at that meeting?

A Yes, I did.

Q What?

A I signed an application for unionship membership.

Q At the conclusion of the meeting, did you bring anything with you from the meeting?

A Yes, I did.

Q What?

A The same cards as I signed at the Hall. I brought them back to the Trading Port the following day.

Q And what did you do with them?

A I distributed them to the employees in the warehouse.

Q What, if anything, did you say to them when you gave it to them?

MR. BOOKSTEIN: I object to this as hearsay.

JUDGE CONSTANTINE: It all depends. Are you going to put in any cards through this gentleman?

MR. SHERIDAN: Yes, I am, your Honor.

JUDGE CONSTANTINE: All right. With respect to the

cards that the people signed, what did you say? I'm not interested in what you said to those that didn't sign.

THE WITNESS: I said to them, I says, "We're going to form a union and I would appreciate it if you would sign these cards, fill them out, and give them back to me." They took the cards, signed them, handed them back to me.

JUDGE CONSTANTINE: All right. This is GC-8(a) through what?

MR. SHERIDAN: 8(a) thru (d). Mark these, please, as General Counsel's Exhibits 8(a) thru (d).

(The document above-referred to was marked General Counsel's Exhibit No. 8(a) thru (d) for identification.)

Q (By Mr. Sheridan) I show you what's been marked for identification as General Counsel's Exhibit 8(a).

JUDGE CONSTANTINE: Show him the whole bunch, 8(a) thru 8(d).

Q (By Mr. Sheridan) 8(a) thru 8(d).

(Document shown to witness.)

THE WITNESS: This card was given to —

Q (By Mr. Sheridan) When you say "this card", which card?

JUDGE CONSTANTINE: Well, look at all four of them. Did you see those four cards signed?

THE WITNESS: Two of them I did and two of them I didn't.

JUDGE CONSTANTINE: Well, —

MR. SHERIDAN: Well, if I could be permitted to go into it, it will save a lot of time if I could ask him about each one.

JUDGE CONSTANTINE: Go ahead.

THE WITNESS: This card here I gave to --

Q (By Mr. Sheridan) By "this card here," you're talking about which one?

A Richard Terry.

Q That's 8(a)?

A And I handed him the card. He took the card, went down the aisle and filled it out, about fifteen minutes later returned the card filled out and signed and dated.

Q And how about 8(b)?

A This one here, Bert Hulsopple, he worked on the freight cars. I handed him the card. He filled it out right in front of me and signed it in front of me and dated it.

Q And 8(c)?

A This one here, Donald Garhartt. I gave him the card. He was working in the rear receiving. He didn't have time to fill it out at the moment. I went back over and he filled it out in front of me, signed it, dated it, and handed it back to me.

Q All right. And 8(d)?

A This one here I gave to Robert Bishop. He filled it out in front of me, but he did not sign it in front of me.

Fowler Riddick — I gave the card to Fowler Riddick, he took it back over and he signed the card in front of Fowler Riddick.

Q So Mr. Bishop filled out the card, all except the signature?

A Yes, in front of me he filled out the card.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibits 8(a) thru 8(d).

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: All right. Receive them in evidence, Mr. Reporter, in the absence of objection.

(The document, heretofore marked General Counsel's Exhibit No. 8(a) thru (d), was received in evidence.)

Q (By Mr. Sheridan) Now, Mr. Houck, I direct your attention to on or about September 5th, 1973, and ask you if you attended a meeting in the warehouse that day?

A Yes, I did.

Q And who — did anyone speak for the Company?

A Yes, Mr. Sam Tabachneck.

Q All right. Were you present yesterday when Mr. Dillenbeck testified about that speech?

A Yes, I was.

Q Do you have any different recollection than he did?

A No, I haven't.

JUDGE CONSTANTINE: Would you say it's about the same?

THE WITNESS: About the same.

Q (By Mr. Sheridan) I'll direct your attention to on or about September 8, and ask if you attended a meeting that day at the Union Hall?

A Yes, I did.

Q And what, if anything, occurred at that meeting; without going into detail as to the substance, what happened?

A That meeting there was about the strike, for a strike in the warehouse. We had a meeting up there. Mr. Robilatto was present.

JUDGE CONSTANTINE: What did you decide at the meeting about the strike? Did you decide to strike or not?

THE WITNESS: Yes, we decided to strike.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) Did you picket during this strike?

A Yes, I did.

Q Now I'll direct your attention to on or about September 29th and ask if you attended a meeting at the Union Hall that day?

A Yes, I did.

Q And what, if anything, did the employees vote to do that day?

A They voted to call off the strike.

Q Now after the vote was taken --

JUDGE CONSTANTINE: Is it necessary to go into that any

further with any other witnesses? It's been stipulated the strike did end the next day.

MR. SHERIDAN: Right.

Q (By Mr. Sheridan) And following that vote, did you attend a meeting at the Company?

A Yes, I did.

Q And is that the same meeting Mr. Dillenbeck has testified about?

A Yes.

Q Were you present when he testified about the meeting?

A Yes, I was.

JUDGE CONSTANTINE: This is the October 1st?

MR. SHERIDAN: No, no, this is September 29th. Following the vote, there was a meeting —

JUDGE CONSTANTINE: Oh, yeah, I was looking at the wrong notes. I've got my notes, yes.

Q (By Mr. Sheridan) Do you have any different recollection as to what was said at that meeting?

A No, I haven't.

Q It has been stipulated that you were one of the employees who offered to return to work on October 1, 1973. Who did you speak to on that occasion?

A Mr. Avrum Tabachneck.

Q And what was the conversation?

A I walked in the warehouse. Mr. Tabachneck — Avrum

Tabachneck come up to us and he said to me, he says, "Did you come to get your layoff slip?" He gave us our layoff slip, took our names down, and he said he'd call us in the future if the work got better.

Q Have you ever been recalled?

A No, I haven't.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right. Go ahead, Mr. Bookstein.

CROSS-EXAMINATION

Q (By Mr. Bookstein) Mr. Houck, did you give a signed statement to some representative of the Board?

A Yes, I did.

Q One or more than one?

A One.

MR. BOOKSTEIN: At this time I would move, Mr. Examiner, that Mr. Sheridan produce that statement for my examination.

MR. SHERIDAN: Let the record show that I'm turning over to Mr. Bookstein a statement from Mr. Houck consisting of six pages -- a handwritten statement of six pages.

JUDGE CONSTANTINE: A five-minute recess.

(A five-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Please proceed, Mr. Bookstein.

MR. BOOKSTEIN: Thank you, sir.

Q (By Mr. Bookstein) Mr. Houck, isn't it a fact that when

Mr. Sam Tabachneck spoke to the employees in the warehouse on September 5 he had a piece of paper in his hand?

A I don't remember.

Q Would you tell me, please, what you remember Mr. Samuel Tabachneck saying in that address to the employees?

A He said that if we went on strike that we would hurt ourselves, plus we would hurt the office employees in the warehouse.

Q What else do you recall him saying at that meeting?

A I don't remember.

Q Sir?

A I don't remember.

Q Were you in the Hearing Room when Mr. Dillenbeck testified?

A Yes, I was.

Q Do you recall his testifying -- do you recall if he testified as to the length of that meeting?

A No, I don't.

Q What is your best recollection as to how long that meeting in the warehouse on September 5 lasted?

A Fifteen, twenty minutes.

Q And is it your testimony that what you've related to this point, with respect to Sam Tabachneck's speech, is all that you recall?

A Yes.

MR. BOOKSTEIN: I have no further questions.

JUDGE CONSTANTINE: All right. Any redirect?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: You may step down.

(Witness was excused.)

MR. BOOKSTEIN: May the record show that I'm returning Mr. Houck's affidavit to Mr. Sheridan.

JUDGE CONSTANTINE: The record may show that. The record may also show that when you requested it, you didn't request an affidavit, you requested a written statement.

Everybody is smiling. I have to bring a little humor to this tense situation.

MR. SHERIDAN: General Counsel calls Daniel Peasley to the stand.

JUDGE CONSTANTINE: I didn't get the last name.

MR. SHERIDAN: P-e-a-s-l-e-y, Jr.

Whereupon,

DANIEL PEASLEY, JR.

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Won't you be good enough to give your name and address for the record?

THE WITNESS: My name is Daniel E. Peasley, Jr. and I live at Knox Cave Road, RD#1, Apartment B, Altamont, New York.

Before this proceeding starts, may I make a statement?

JUDGE CONSTANTINE: No. You're here to answer questions.

THE WITNESS: Yes, sir, but this is due to a -- they gave an incorrect name -- mine is incorrect.

JUDGE CONSTANTINE: That's somebody else's problem. You're here to answer questions.

MR. SHERIDAN: Do you want to state how your name is spelled, Mr. Peasley?

THE WITNESS: It's not Donald, it's Daniel.

JUDGE CONSTANTINE: That's what they said. My notes show Daniel.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Peasley, did you ever work for Trading Port?

A Yes, sir.

Q When?

A The first time I worked for Trading Port, I started in March of '68 and I quit the job in August of 1970. I was rehired in March of '72 and my job was terminated in November of '73.

Q What was your job when you last worked there?

A I worked as a dairy man.

Q Now I'll direct your attention to on or about August 29th and ask if you attended a meeting at the Union Hall

that day?

A Yes, I did.

MR. SHERIDAN: Mark this for identification, please, as General Counsel's Exhibit 9.

JUDGE CONSTANTINE: 9(a) thru what?

MR. SHERIDAN: Just 9.

(The document above-referred to was marked General Counsel's Exhibit No. 9 for identification.)

MR. BOOKSTEIN: May I please see General Counsel's 9 for identification for a moment, Mr. Sheridan?

(Document handed to Mr. Bookstein)

MR. BOOKSTEIN: Thank you.

Q (By Mr. Sheridan) When you were at the Union meeting, did you sign anything there, Mr. Peasley?

A Yes, I signed two cards.

Q I show you General Counsel's Exhibit 9 and ask if you have ever seen that before?

(Document shown to witness.)

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) When did you see it?

A I saw it the day following the meeting. I was outside the dairy sitting on juices. I watched Jim Harter fill out the card and sign it.

JUDGE CONSTANTINE: Whose card is it?

MR. SHERIDAN: James Harter, H-a-r-t-e-r.

Q (By Mr. Sheridan) Do you know what he did with it after he filled it out and signed it?

A No, I don't, sir.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibit 9.

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: All right. Receive it in evidence.

(The document, heretofore marked General Counsel's Exhibit No. 9, was received in evidence.)

Q (By Mr. Sheridan) Now, from September 1 to September 9th, where were you, Mr. Peasley?

A From September 1 to September 9th I was on vacation in Miami, Florida.

Q Now during the strike, did you picket at all?

A Yes, sir.

Q How often?

A Every day.

Q And what shift did you picket?

A I started with the shift from midnight to 4:00 in the morning. The last two weeks I went from midnight to 6:00 o'clock, and the last week I went from 12:00 noon to 6:00 in the evening.

Q Now during the last week of the strike, while you were picketing, do you ever recall Mr. Isadore Tabachneck coming out to the picket line?

A Yes, sir.

Q How often did he come out?

A I would say he had to come out at least once a day.

Q Did he say anything when he came out?

A Yes, sir.

Q What did he say?

A He told us that they — well, he told me that I had not enough seniority to get back into the warehouse, that he wouldn't take me back at half my pay, he wouldn't even take me back if I paid him.

Q Do you recall anything else that he said?

A Not directly to me, but I did overhear the conversation involving Ray Valerio.

Q Do you recall when that was?

A It was either the 28th or the 29th — the 28th.

Q And what of the conversation did you overhear?

A Well, I wasn't standing right there —

JUDGE CONSTANTINE: Well, just answer the question. Did you overhear it; if so, what did you overhear? If you didn't overhear anything, don't be afraid to say so.

THE WITNESS: Excuse me, sir, I'm leaving this.

JUDGE CONSTANTINE: All right. I'll entertain a motion to strike his evidence, Mr. Bookstein.

MR. BOOKSTEIN: I so move.

JUDGE CONSTANTINE: I'll grant it.

MR. SHERIDAN: Mr. Peasley, you're still under subpoena.

THE WITNESS: I will not be harassed by a Judge or anybody else.

JUDGE CONSTANTINE: I want to make it clear that I will not allow him to come back. If he does, then I'm going to disqualify myself. This guy is a snotty no good guy and I want the record to show it.

MR. SHERIDAN: May I have a five-minute recess, your Honor?

JUDGE CONSTANTINE: What's that?

MR. SHERIDAN: Could I have a five-minute recess?

JUDGE CONSTANTINE: Yes.

MR. SHERIDAN: This has taken me by as much surprise as everybody else in this Hearing Room, I can assure you.

(A five-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

In an off-the-record discussion both Mr. Pozefsky and Mr. Sheridan asked to let this man complete his testimony. I said that I would not, so Mr. Sheridan now wants to make an offer of proof.

MR. POZEFSKY: On the record, your Honor, may I add that in that off-the-record discussion I stated that the man wished to apologize to your Honor.

JUDGE CONSTANTINE: Yes, sir.

MR. POZEFSKY: And to continue his testimony.

JUDGE CONSTANTINE: Well, it's something more than just an apology. I don't mind if he apologizes. He also wanted to come back and take the stand. I don't feel I can be impartial with respect to him and that's why I won't let him come, but you may make an offer of proof.

MR. BOOKSTEIN: May I first, Mr. Examiner, make an observation?

JUDGE CONSTANTINE: Go ahead.

MR. BOOKSTEIN: Under Section 102.35(f) of the Rules and Regulations, you, sir, are certainly in power to regulate the course of the hearing and if appropriate or necessary to exclude persons from the hearing for contemncious conduct and to strike all related testimony.

JUDGE CONSTANTINE: I'm not going to exclude it from the hearing. I merely struck his testimony. They have a right to make an offer of proof.

MR. BOOKSTEIN: Okay. I understood, Mr. Examiner, you to make the statement -- I'm not sure whether it was on or off the record -- the record will show that you would not allow Peasley back.

JUDGE CONSTANTINE: I meant back on the stand.

MR. BOOKSTEIN: I see. All right.

JUDGE CONSTANTINE: He's in the courtroom now. I will not exclude him from the room. He may stay in the room but

I will not take further testimony from him.

MR. BOOKSTEIN: Well, I would respectfully question, then, the appropriateness to an offer of proof in the posture of Mr. Peasley. I think it's not proper.

JUDGE CONSTANTINE: Could be, but I think he has a right to protect his rights. In other words, it could be that Peasley wouldn't say anything further, in which case the Board might say I -- it's harmosaro (phonetic). He also might say that Peasley would testify to the following.

MR. BOOKSTEIN: But Mr. Sheridan's offer of proof cannot possibly tell us what Mr. Peasley would have testified to. I question whether an offer of proof is appropriate in these circumstances.

JUDGE CONSTANTINE: Well, then I'll have to ask Mr. Sheridan: Do you have a written statement from him on which to base your offer of proof?

MR. SHERIDAN: Yes, I do, your Honor.

MR. BOOKSTEIN: That doesn't really meet my objection. As long as I've stated it for the record, I'm content. I don't want to delay things.

JUDGE CONSTANTINE: All right. Go ahead.

MR. SHERIDAN: Yeah. I just want to make clear for the record, I'm not trying to apologize for what the man did, but I do object to the fact that he's not permitted to testify further. Yes, if Mr. Peasley were allowed to testify,

he would testify that he returned to the warehouse on November 5th, after he received the termination letter, that he spoke to Mr. Avrum Tabachneck and to Mr. Brunelle, both of whom at that point are admitted to be supervisors. During the course of that conversation, Mr. Tabachneck said that he thought Mr. Peasley was headstrong about the Union, that he would not sit down and listen to his side of the story; that he also said, among other things, that there will be an election on December 4th. He asked Mr. Peasley to vote "no" or do not show up at the election at all. Mr. Peasley said he would comply with his wishes; that Mr. Avrum Tabachneck also said there were a few people there that they would never take back. Named among those, by Mr. Avrum Tabachneck, were James Dillenbeck and James Houck, and he gave as the reason why they would not be taken back is because they provoked the union trouble; that Mr. Avrum Tabachneck said that if the union got in he would close the warehouse.

He would further testify that between November 14th and November 23rd, Mr. Peasley received a phone call from Mr. Brunelle.

JUDGE CONSTANTINE: Does the Complaint go that far?

MR. SHERIDAN: Yes, it does, your Honor. It's all in the Complaint — that Mr. Brunelle asked Peasley if he still wanted to go back to work. Mr. Peasley, prior to that, had

sent a letter to the Company. Mr. Peasley asked Brunelle if Avrum Tabachneck had shown him the letter he had written, Brunelle said yes. Mr. Peasley said that the letter should answer his question, and Mr. Brunelle then said if that was the case, it would be more beneficial to Mr. Peasley not to show up at the December 4th election. Mr. Peasley said he would not show up for the election, and he didn't show up for the election.

That's the offer of proof, your Honor.

JUDGE CONSTANTINE: All right. I'm not sure the record is clear why I said that I granted Mr. Bookstein some motion to strike his testimony. The witness got up and walked off the witness stand and left the room, and it was that which caused me to grant his motion to strike his testimony. It could be the Board disagrees with me but I'm not going to have any witnesses do that to me.

All right, go on, call your next witness, please.

MR. SHERIDAN: General Counsel calls Glenn Passino to the stand, please.

JUDGE CONSTANTINE: Will you spell the last name, please?

MR. SHERIDAN: P-a-s-s-i-n-o.

JUDGE CONSTANTINE: One or two n's in Glenn?

MR. SHERIDAN: Two.

Whereupon,

GLENN PASSINO

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Will you please give your name and address to the Reporter?

THE WITNESS: Glenn Passino, 85 Aiken Avenue, Apartment 27, Rensselaer, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Passino, did you ever work for Trading Port?

A Yes.

Q And when did you first start working there?

A September 21st, 1966.

Q And what was your job?

A Multiple man.

JUDGE CONSTANTINE: What kind of a man?

THE WITNESS: Multiple man.

JUDGE CONSTANTINE: Thank you.

Q (By Mr. Sheridan) All right. I'll direct your attention to on or about August 29th and ask if you attended a meeting at the Local 294 Hall?

A Yes.

Q Did you sign anything while you were there?

A Yes.

Q What was it?

A The pledge cards to join the Union.

Q Now on or about September 5th, did you attend a meeting at the warehouse where Sam Tabachneck spoke to the employees?

A Yes.

Q And do you recall what he said?

A He just told us that if we intended to go on strike that we were taking food out of the office or clerical workers that worked in the office mouth, as well as our know, and he'd close the place down.

Q Do you recall anything else that he said?

A Not right offhand.

Q All right. Now I'll direct your attention to a week prior to the strike. Did you have any conversations with Mr. Brunelle?

A Yes, sir.

Q Where were these conversations?

A In the aisle.

MR. BOOKSTEIN: I'm going to object to this entire line of testimony, Mr. Examiner, on the grounds that Mr. Sheridan has failed to establish that Mr. Brunelle was a supervisor on the date of the conversation concerning which he's about to question.

JUDGE CONSTANTINE: Maybe so but I can't stop him from elucidating or adducing additional evidence from this

witness which may or may not help him in establishing Mr. Brunelle's supervisory status.

MR. BOOKSTEIN: I believe the last question asked, if I heard it correctly, is one that could not possibly go to establish that gentleman's supervisory status.

JUDGE CONSTANTINE: All he did was ask him if Mr. Brunelle spoke to him about a week before the strike started. Now let's see what the next question is. I'm going to allow that question. It doesn't harm you.

Q (By Mr. Sheridan) How often did he speak with you?

A I think it was twice.

Q Was anyone else present?

A Yes. Donald Engel was there once, and I was by myself the second time.

Q All right. Now, when Mr. Brunelle talked to you the first time, before he got into any discussion with -- what did he say? Did he say why he was there?

MR. BOOKSTEIN: I object to any questions about what he said.

JUDGE CONSTANTINE: I think, unless you establish his supervisory capacity, I'll sustain the objection. You may, through this witness, bring out additional duties which may or may not establish his supervisory capacity; otherwise, I'll sustain the objection and let you make an offer of proof.

MR. SHERIDAN: Well, let me ask you this, your Honor: Am I permitted to establish his agency status?

JUDGE CONSTANTINE: Yes.

MR. SHERIDAN: All right.

MR. BOOKSTEIN: Well, if I may --

JUDGE CONSTANTINE: He hasn't yet. If he can do it through this witness, I will allow it.

MR. BOOKSTEIN: If I may so so, sir, that is precisely the --

JUDGE CONSTANTINE: Do they allege he's an agent in the --

MR. BOOKSTEIN: No, sir.

JUDGE CONSTANTINE: You do not?

MR. BOOKSTEIN: This is the initial motion that was made when this hearing commenced yesterday, it was to amend the Complaint.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: This is what I pointed out yesterday, your Honor.

MR. BOOKSTEIN: In order to assert as a Paragraph 5(b)--

JUDGE CONSTANTINE: I should have known -- yes, all right.

MR. BOOKSTEIN: -- that they were agents within 213 of the Act and that motion was denied.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Your Honor, the Complaint as it stands now alleges that Mr. Brunelle is an agent and a supervisor.

JUDGE CONSTANTINE: Did I allow that or is that in the original --

MR. SHERIDAN: No, that's in the original Complaint, that's what it says.

MR. BOOKSTEIN: It is not in the sense that the term "agent" is a word of art or else Mr. Sheridan would never have made the motion he made at the outset of this hearing.

JUDGE CONSTANTINE: I'll have to look at the Complaint. I don't want to make any rulings in the abstract. I'll have to construe the Complaint as to whether within the meaning of the Complaint he may do it. I disallow an amendment yesterday but I still want to look at the Complaint. Can you pick out that paragraph that you're interested in?

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: That will save me reading the whole Complaint.

(Mr. Sheridan points out paragraph to Judge.)

MR. SHERIDAN: Paragraph 5, your Honor.

JUDGE CONSTANTINE: All right. What does the Answer say with respect to that?

MR. BOOKSTEIN: The Answer denies the allegation, and the motion that was made at the outset yesterday was to re-title Paragraph 5 of the Complaint as 5(a) and add a 5(b) to

allege that Messrs. Brunelle, Snyder, and Stevens were agents within the meaning of Section 2(13) of the Act, and that motion was denied as untimely, and I submit that that Complaint, particularly coupled with the motion, is not susceptible of a reading, that the word "agent" as used there is used in the statutory definition sense.

MR. SHERIDAN: Your Honor, the original Answer admitted Mr. Brunelle's status, if you will note in the formal documents.

MR. BOCKSTEIN: But there was no allegation of agency status or else Mr. Sheridan would never have made the motion he made at the very outset of this hearing.

JUDGE CONSTANTINE: Well, I'd rather construe 5 reasonably, not narrowly, that's what I believe is the Federal Rule — reasonably construed, they allege that these men have two statuses, agency and supervisors. I have ruled that on the evidence before me you have failed to establish that they're supervisors. I'm going to let him, if he can, establish agency, because I construe this to mean that they're alleging that all the persons named in Section 5 are both agents and supervisors. I think that's a reasonable construction of the Complaint. I'm not ruling he is an agent. I've only ruled that he is not a supervisor on the evidence before me.

Before you ask him any questions as to what was said to

him by Brunelle, you'll have to show he was an agent. You may do it any way you wish. Go ahead.

Q (By Mr. Sheridan) All right. What was -- when Mr. Brunelle talked to you the first time, what was the first thing he said to you?

JUDGE CONSTANTINE: Wait a minute. I'm not going to allow any conversation.

MR. SHERIDAN: Well, the first part of the conversation will be --

JUDGE CONSTANTINE: You can't establish agency through the agent.

MR. BOOKSTEIN: Through the agent, no, sir.

MR. SHERIDAN: You can't establish it but --

JUDGE CONSTANTINE: Not where I come from.

MR. SHERIDAN: But the testimony -- I mean you can't establish it in and of itself but it doesn't mean that the testimony is excluded.

JUDGE CONSTANTINE: I'm going to exclude it. You may make an offer of proof on that, too, because I have to go by what I learned not only in law school but in private practice. You can't establish agencies through the agent.

MR. SHERIDAN: All right, can I make an offer of proof?

JUDGE CONSTANTINE: Of course.

MR. SHERIDAN: All right.

MR. BOOKSTEIN: Would you give me one second, please,

Mr. Sheridan. I have something I may want to say on that. (Pause) All right, I have nothing to say.

JUDGE CONSTANTINE: All right, go ahead, make your offer of proof, please.

MR. SHERIDAN: Yes, your Honor. If permitted to testify, Mr. Passino would testify that when Brunelle spoke to him the first time, he said that Sam Tabachneck had sent him out to find out what was going on; that Brunelle then said if the Union got in they would close down —

MR. BOOKSTEIN: Now hold one moment, if I may. I would submit that the offer of proof made by Mr. Sheridan should be limited to that portion of the conversation which he contends bears on the issue of whether Brunelle was at that time an agent.

JUDGE CONSTANTINE: I understand that, but he's also entitled to the rest of the conversation in case the Board thinks that I'm wrong on agency. They may want to send it back for further hearing. If they think I'm right on agency, they will ignore the other conversation, so I'm going to allow the whole thing in. I think it's a proper offer of proof.

Go ahead.

MR. SHERIDAN: Yes. As I started to say —

JUDGE CONSTANTINE: What do you mean by "yes," you agree with me?

MR. SHERIDAN: No.

(Laughter)

MR. SHERIDAN: Mr. Brunelle said, as I said before, if the Union got in they would close down because they were definitely against the Union; and that during one of these conversations, at least, Mr. Solomon, who was at that time, of course, an admitted supervisor, warehouse manager, walked by and Brunelle said substantially what Mr. Engel said he said about the fact that Mr. Solomon was there, to his knowledge of the conversation.

MR. BOCKSTEIN: I don't believe that anything was said by Mr. Engel about Mr. Solomon's knowledge of what was being said, merely that a conversation was in process, but the record will show.

JUDGE CONSTANTINE: No, no. I have ruled that Solomon's mere presence there did not constitute ratification. The Board can reverse me. He has the right to tell the Board all the circumstances relating to this man's agency, so I'll allow that in as an offer of proof.

MR. SHERIDAN: All right.

Q (By Mr. Sheridan) Did you picket during the strike, Mr. Passino?

A Yes, sir.

Q And how often did you picket?

A Every day.

Q What was your shift?

A 12:00 noon to 4:00 o'clock.

Q Now during the times you were picketing, were there ever any occasions when you saw Mr. Isadore Tabachneck at the picket line?

A Yes.

Q How often did you see him there?

A A day?

Q No, how often?

A Oh, maybe four times a day.

Q And did he say anything?

A Well, he was constantly harassing.

MR. BOOKSTEIN: Well, I object to that as an improper characterization and move that it be stricken.

JUDGE CONSTANTINE: Only the word "harass."

MR. BOOKSTEIN: Without the word, he hasn't said anything.

Q (By Mr. Sheridan) What, if anything, did Mr. Isadore Tabachneck say?

A That we'd be staying there until the wintertime come.

Q Do you recall a conversation — did you at any time overhear a conversation between Isadore Tabachneck and Gary Deyss?

A Yes.

Q Who is Gary Deyss?

A Who is he -- he's an order selector.

Q He's also an employee, is that right?

A Right.

Q Was he one of the picketers?

A Yes.

Q And what did you hear of this conversation?

A That he was so far on the bottom --

Q Please, just say who's doing the speaking.

A Oh, Isadore.

Q Okay, and what did he say?

A How do you want me to say what I was going to say?

Q Yeah, what you heard.

A He told Gary Deyss that he -- first of all, he asked Gary Deyss what his name was. He has a nickname, we all know him as "Farmer." So he went in the office and brought out a seniority roster and he couldn't find his name on the list at all, so then I told him his name was Deyss. Sam said, "You're so far down on the bottom of the seniority list, I'd hire Mrs. Bishop or Mrs. Passino before I'd even take you back in the warehouse again."

Q Did the two wives that he referred to ever work at the Trading Post?

A I know my wife didn't. I don't know about Mrs. Bishop, though.

Q Did you attend a meeting on or about September 29th at

the Union Hall?

A Yes, sir.

Q And what, if anything, did the employees do at that meeting?

A They voted to go back to work.

Q I'll direct your attention to — it's been stipulated that you were one of the individuals who offered to return to work on October 1, 1973. Who did you talk with on that occasion?

A Isadore and Avrum outside the door.

Q And what was your conversation with Avrum?

A He said this could have been settled in some other way, without going on strike.

Q And what, if anything, else did he say about — this is October 1, now, when you offered to return.

A He just said that it could have been settled some way else.

Q What, if anything, did he say to you about your job?

A "There's no work," that's what he said, the first thing, "There's no work."

Q That's what I mean, yeah. Did he give you anything on that occasion?

A Yes, a layoff slip.

JUDGE CONSTANTINE: Who gave you that layoff slip?

THE WITNESS: It was Helen Schenck.

Q (By Mr. Sheridan) Who is she?

A She works in the office downstairs.

MR. SHERIDAN: Will you mark these for identification, please, as General Counsel's Exhibits 10(a) and 10(b).

(The document above-referred to was marked General Counsel's Exhibit No. 10(a) thru (b) for identification.)

Q (By Mr. Sheridan) I show you what's been marked for identification as General Counsel's Exhibit 10(a), Mr. Passino, and ask you if you've ever seen that card before?

(Document shown to witness.)

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) And who gave the card to that individual?

A I did.

Q And what, if anything, did he do with it when you gave it to him?

A He filled it out and signed it in front of me.

Q And what did he do after he filled it out and signed it?

A Gave it back to me.

JUDGE CONSTANTINE: May I have the name of that individual?

MR. SHERIDAN: Yes. Warren Deitz, D-e-i-t-z.

JUDGE CONSTANTINE: Thank you.

Q (By Mr. Sheridan) I show you General Counsel's Exhibit 10(b) and ask you if you've seen that card before?

(Document shown to witness.)

THE WITNESS: Yes, sir.

Q (By Mr. Sheridan) And who gave the card to that individual?

A I gave the card to him.

Q And what, if anything, did he do with it when you gave it to him?

A He filled it out but I did not see him sign it.

Q He filled it out?

A Yes, but I did not see him sign it.

JUDGE CONSTANTINE: Well, after he filled it out, what did he do with it?

THE WITNESS: He gave it back to me.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) When he gave it back to you was it signed?

A Yes.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibits 10(a) and (b).

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: In the absence of objection, I'll receive them. May I have the name of (b) just for my notes?

MR. SHERIDAN: Douglas Martin, M-a-r-t-i-n.

JUDGE CONSTANTINE: Thank you.

(The document, heretofore marked

General Counsel's Exhibit No. 10(a) thru (b), was received in evidence.)

JUDGE CONSTANTINE: I just went to be sure that I've been keeping track — it will only take a second. My notes show that you've introduced 35 cards; is that about right?

MR. SHERIDAN: I really haven't kept track of them. I can tell you in a second.

(Pause)

JUDGE CONSTANTINE: It doesn't matter. The record will —

MR. SHERIDAN: It's either 34 or 35.

JUDGE CONSTANTINE: All right.

Q (By Mr. Sheridan) All right, Mr. Passino, I direct your attention to about two weeks after the strike ended. Did you go to the warehouse?

A Yes.

Q And who, if anybody, did you speak with?

A Avrum Tabachneck and Luke Brunelle.

Q Where did you speak with them?

A In a little sublet office they got, where Luke Brunelle's desk is — across from his desk, I mean.

JUDGE CONSTANTINE: At this time my notes show that Brunelle was a supervisor.

MR. SHERIDAN: Yes, that's correct.

JUDGE CONSTANTINE: I just want to be sure my notes are

right.

Q (By Mr. Sheridan) All right. Now when you first went in there, who was there?

A Who was there — I seen Luke.

Q I mean when you first went to the warehouse?

A When I first went to the warehouse?

Q No. Where did you speak with these individuals?

A Oh, right in his office. They got an office in there.

Q Right. And who was in the office?

A Okay, there was Avrum and Luke, then Sam came in and shook my hand and Isadore came in and shook my hand.

Q Did you have a conversation with Avrum?

A Yes, more or less.

Q All right. And what was the conversation? What did you say to him and what did he say to you, if anything?

A We got talking about the guys who did go back to work. He sort of like showed me a list right there, and I told him we had an election coming up pretty soon and 10 of them out of the 18 would probably go for the Union anyways.

Q And what did he say?

A He doubted it.

Q What else did he say, if anything?

A Then he sort of, like, was asking me how I would vote, and I told him I was undecided, and he said, "That's hard to believe because you're headstrong on it."

JUDGE CONSTANTINE: I would like to go off the record for a moment. The tape is running out.

(A short recess taken to change the tape.)

JUDGE CONSTANTINE: We didn't go off the record so let's proceed.

Q (By Mr. Sheridan) Now, Mr. Passino, going back to this conversation that you've been testifying about, you testified that Mr. Avrum Tabachneck asked you how you were going to vote?

A Yes.

Q And what was it that you said?

A I said I was undecided because the Union showed me nothing and they have showed me nothing for the seven years I was there.

Q And what did Avrum Tabachneck reply to that?

A "Well, that's hard to believe."

Q Do you recall anything else that he said during the conversation?

A No, but Isadore come in, when he shook my hand. He said, "I want to see you before you leave."

Q No, just — I'm talking now about Avrum. Do you remember Avrum Tabachneck saying anything else during the conversation?

A I can't remember.

Q Do you recall him asking you anything else, other than

what you've testified to?

A If I do, I don't remember.

JUDGE CONSTANTINE: I'm going to rule that you've exhausted his memory.

Now I want to make it clear that you may ask questions, but try, by the nature of the question, even though it's leading, not to put the answer in his mind. You can so frame it that it's still a leading question without suggesting the answer. Go ahead.

Q (By Mr. Sheridan) Let me ask you this, Mr. Passino: What was the first thing Mr. Tabachneck asked you when you first talked to him?

MR. BOOKSTEIN: Which Mr. Tabachneck?

Q (By Mr. Sheridan) Avrum.

JUDGE CONSTANTINE: He's still with Avrum because he said —

THE WITNESS: What was the first thing that he asked?

Q (By Mr. Sheridan) Who spoke first during the conversation, yourself or Mr. Avrum Tabachneck?

A I did. I asked him when was he going to take some of us back to work.

Q And what did he say to this?

A It would be a couple weeks.

Q All right. You've testified something about a list he had?

A Yes. The men that went back to work, that didn't stay out the full three weeks of the strike that most of us did. The guys that went back and, I don't know, one or two guys go back a day, and he had a list there with each date the guy come back, and they had to respect the rights of them guys before they would take anybody back.

Q And what did you respond to this? Did he show you the list?

A Yes.

Q And what did you respond to this?

A I told him that there's about 18 guys named on the list, I said, "10 of them will probably vote for Union anyways."

Q Then what did he say to this?

A He doubted it.

Q All right, now, at this point, what do you recall him saying, after he said he doubted it?

A (No response.)

Q Let me ask this: In addition to his asking you, which you've already testified to, how you were going to vote, do you remember him asking you anything else, or questioning you?

A I can't think.

Q Do you recall during the conversation your telling Mr. Tabachneck any particular problems you had at the warehouse?

A Oh, yes, that I was tired of doing everything in the place.

Q Before you said that, did Mr. Avrum Tabachneck say anything to you?

A It was more like Luke — "Luke is always saying what a good worker you are, patting your back, and all this stuff."

Q Prior to your saying that you were tired of doing everybody else's work, did Mr. Avrum Tabachneck say anything to you?

MR. BOOKSTEIN: Wait a minute, I don't think that's a correct statement, what the witness said. I don't think the witness testified that he was doing everyone's work. I think he said "tired of doing everything in the place."

THE WITNESS: That's what I said.

MR. BOOKSTEIN: I don't think Mr. Sheridan's characterization of it is accurate.

Q (By Mr. Sheridan) All right, prior to your saying you're tired of doing everything in the place, did Mr. Avrum Tabachneck say anything to you that would prompt you to answer it that way?

MR. BOOKSTEIN: I object to the form of that question.

JUDGE CONSTANTINE: I'll allow it. I don't think it's leading.

THE WITNESS: I forgot the question already.

Q (By Mr. Sheridan) Well, you've testified that you said

that you were tired of doing all the work in the place. Was there anything that Mr. Avrum Tabachneck said to you which prompted you answering -- in saying that?

A Well, then we got talking about different people in the warehouse, too, who the dogs were, who didn't do all the work, who did the work, and all this stuff here, and that's when I told him, I said, "Well, if I do more work than them, why don't I get paid more?"

Q All right, let me ask you this: After the end of the conversation, what did you do?

A Then Isadore told me, when he shook my hand, that he wanted to see me before I leave.

Q And after you left -- after you had the conversation with Avrum, where did you go?

A I had a talk with Luke then.

Q All right. Where did you have your talk -- when you say "Luke," is that Mr. Brunelle?

A Luke Brunelle. I went to the bathroom and I come back out and he was -- we call it the lunchroom, where the refrigerator and stuff is there.

Q Was anyone else there?

A Casper Dambrose walked in.

Q Did he hear the conversation between yourself and Luke?

A No, Luke was hush, hush, hushing -- all he kept -- Luke wanted to say was, "Why couldn't you do this with a Company

union?

Q What did you say to this?

A I said, "It would never work because you'd do just like you have before, give us something and a week later take it away from us."

Q And after you finished the conversation with Mr. Brunelle, where did you go?

A Then I went down to the lower office with Isadore.

Q And did you have a conversation with him?

A Yes.

Q And what was the conversation?

A Well, he knew I was on public assistance at that time, Welfare, and he tried to get me to work underneath the table on a Sunday, filling orders.

Q What did he say?

MR. BOOKSTEIN: I object to the witness's answer and move to strike it. I have no objection to anything he says Isadore Tabachneck said, but I think that's nothing but a characterization by the witness.

JUDGE CONSTANTINE: Well, let's find out. Did he use the words "under the table?"

THE WITNESS: Yes.

JUDGE CONSTANTINE: I'll allow it.

Q (By Mr. Sheridan) What were his exact words, Mr. Passino, as best as you can recall?

A He said, "Glenn, I know you need money; I like you; and I know we always get along fine. I know you can use the money. If I got an abundance of orders this Sunday, can you come in if I call you up, or you call me up and find out."

Q What did you say to this?

A I said "no." I said, "Izzy, I know you like me, and I like you, but as far as you calling Welfare on me Monday, I'd be in jail Monday afternoon for working under the table."

Q Were you ever recalled?

A No.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right.

CROSS-EXAMINATION

Q (By Mr. Bookstein) Mr. Passino, did you give any representative of the Board a signed statement?

A Yes.

Q One or more than one?

A It was one and a partial of another one.

MR. BOOKSTEIN: I would move, then, for the production of those statements.

MR. SHERIDAN: Well, your Honor, we only have one signed statement from Mr. Passino. I will represent that I did, in fact, speak to Mr. Passino and I made some notes, but

they've been incorporated in my brief —

JUDGE CONSTANTINE: All right, let me ask you this — it doesn't have to be under oath. Did you read back to him the part which is not sworn to, your notes, did you ask him whether those notes were accurate and whether he confirmed them or not, or did you merely write from the notes into the affidavit and then ask him to confirm in the affidavit what he said?

MR. SHERIDAN: No, I — there's only one affidavit, your Honor, but —

JUDGE CONSTANTINE: You still haven't answered my question. Did you take up with him the part that is in your notes — you said you took down some notes.

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: Did you read those notes back to him?

MR. SHERIDAN: Yes, I would have had to done that during pre-trial, but I now have incorporated the notes into my trial brief, your Honor. I have no notes as such, other than what's in the trial brief.

JUDGE CONSTANTINE: All right. In other words, what you took in the notes you put in the affidavit?

MR. SHERIDAN: No, there's only one affidavit, your Honor, which was taken early in the investigation. The notes are in no affidavit.

JUDGE CONSTANTINE: It doesn't matter. If — the Board has ruled that if you take notes and then read them back to him and ask him whether he confirms them or not, that whether he swears to them or not, Counsel is entitled to those. You know, yourself, whether you took them up with him or not and asked him to confirm them. In other words, did you read your notes back to him, as distinguished from reading the affidavit back to him?

MR. SHERIDAN: I didn't read the notes back to him.

JUDGE CONSTANTINE: All right. Since you didn't read them, there was no occasion for him to confirm them, therefore, I'm going to rule that you don't have to, unless you want to, give Mr. Bookstein the notes, but he is entitled to the affidavit.

MR. BOOKSTEIN: If I may say so, Mr. Examiner, under Section 102.11 2(d), the term "statement" would incorporate — include a written statement made by the witness and signed, or otherwise adopted and approved by him, and I would respectfully submit that the notes taken might have been otherwise adopted or approved by the witness without Mr. Sheridan having read them back to him.

JUDGE CONSTANTINE: Well, I'm going to rule that he's got to read them back or at least show them to him, there's nothing in between.

MR. SHERIDAN: Your Honor, I'll tell you what I'll do.

I will, in fact, although I don't really feel I need produce them, I will give Mr. —

JUDGE CONSTANTINE: I'm not ordering you to do it.

MR. SHERIDAN: I'll do it anyway.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: I'll give Mr. Bookstein part of my trial brief which includes what he has testified to beyond the affidavit — he's been permitted to testify to.

JUDGE CONSTANTINE: I know what the Rule says. It says, he's got to adopt them, but he can't adopt them unless they're read to him, or unless, somehow, they're called to his attention and he says that that is correct, but there is nothing to indicate —

MR. BOOKSTEIN: But Mr. Sheridan has not yet stated whether the witness was handed the notes, perhaps, and read them and said, yes, that's right. I'd be happy to accept Mr. Sheridan's word, by the way, on whether or not they were adopted by the witness.

JUDGE CONSTANTINE: He says they weren't. They're only his trial notes.

MR. BOOKSTEIN: If he says that they weren't adopted, then I have no interest in them.

JUDGE CONSTANTINE: All right. He doesn't want them. Just give him the affidavit. How many pages?

MR. SHERIDAN: Three pages.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Your Honor, as a matter of fact, I would prefer that Mr. Bookstein do have the notes

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: We're playing outfox the Gaston here.

(Laughter)

JUDGE CONSTANTINE: Come back at ten minutes to three, gentlemen. We'll have a recess until then.

MR. SHERIDAN: I'd just like the record to show that I am giving Mr. Bookstein a signed affidavit consisting of three pages, plus two typed notes relating to other matters he testified about.

JUDGE CONSTANTINE: All right.

(A short recess was taken.)

JUDGE CONSTANTINE: On the record.

Q (By Mr. Bookstein) Mr. Passino, when you attended the September 5 meeting at which Sam Tabachneck spoke to employees, did you notice whether or not he held some papers in his hand?

A Yes, he had papers in his hand.

Q And do you recall approximately how long he spoke?

A Approximately 25 minutes.

Q And do you recall -- withdrawn. Mr. Sheridan, on direct examination, asked you what Mr. Tabachneck said on that occasion, did he not?

A Yes.

Q And you answered him?

A Yes.

Q When you answered him, was that all you recall Mr. Sam Tabachneck saying that day?

A Yes.

Q Now on the occasion on the picket line when you overheard this conversation between Isadore Tabachneck and Mr. -- is it Deitz?

A Deyss.

Q -- Deyss -- did you see the paper that you say Isadore Tabachneck brought out?

A Yes.

Q Isn't it a fact that when you gave a signed statement to the Board Agent concerning that picket line incident, you made no mention in that statement about any piece of paper in Mr. Tabachneck's possession?

A I said he brought a seniority roster out with him.

Q We're talking about the picket line incident?

A Yes, with Deyss.

Q I call your attention to your statement Mr. Sheridan gave me and I ask you if on the last page, is that your signature, Mr. Fassino?

A Yes.

Q Would you read Paragraph 7 to yourself, please?

A (Witness complies.)

Q And I ask you, isn't it a fact that in your signed statement there is no mention, in connection with the picket line incident you described on direct examination, of Mr. Isadore Tabachneck having a seniority roster or anything else in his hand?

A It says right here, though, "he had seniority list."

Q Isn't that referenced to something that Mr. Isadore Tabachneck said to Deyss?

A Would you repeat your question again?

Q Yes. Isn't it a fact that you told the Board that Mr. Isadore Tabachneck said to Mr. Deyss that he was so far back on the seniority list, et cetera?

A He said that.

Q Right. But isn't it also true there is no mention in your statement to the Board of Mr. Isadore Tabachneck physically having any list at all on him?

A No, I remember this precisely because I told them that he had a seniority list with him.

Q My question is, does it appear in that statement?

A No, it doesn't.

Q All right.

JUDGE CONSTANTINE: I might say that my notes don't show that that statement — that he said anything about a paper in his direct testimony. You brought that out on

cross, so I see no inconsistency between his testimony and that paper.

MR. SHERIDAN: I always like to let the record stand when these things are done, your Honor.

JUDGE CONSTANTINE: It's all right, I'm just commenting on it.

MR. BOOKSTEIN: My notes are at variance, and whatever it is, it will show.

JUDGE CONSTANTINE: Yes. I might say that these little things aren't going to decide the case. I'm going by --

MR. BOOKSTEIN: I have no further questions.

JUDGE CONSTANTINE: All right. Do you have any re-direct?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: You may step down, Mr. Witness.

(The witness was excused.)

MR. BOOKSTEIN: May the record show I am returning Mr. Sheridan's statement, sir?

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: Your Honor, at this point Mr. Miller will question the next witnesses.

JUDGE CONSTANTINE: Of course.

MR. MILLER: I call Mr. Charles Ballou.

Whereupon,

CHARLES BALLOU

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please give your name and address for the record.

THE WITNESS: My name is Charles Ballou, B-a-l-l-o-u. I live at 186 Colonie Street, Albany, New York.

JUDGE CONSTANTINE: I just want to ask him one question. It has nothing to do with the case. I used to practice in Springfield and the best lawyer in Springfield was a man by the name of Ballou. Are you related to him?

THE WITNESS: No.

DIRECT EXAMINATION

Q (By Mr. Miller) Mr. Ballou, have you ever worked at the Trading Post?

A Yes, I have.

Q From when to when?

A I worked there on three previous occasions; once in 1969; once in 1971; and again in 1973.

Q What happened in '69 and '71?

A In '71 I was laid off because of lack of work. '69, I can't remember.

Q Do you know if they followed any procedure in 1971 in deciding who would be laid off?

A Seniority.

Q Did you ever return to Trading Port after that?

A Yeah, June, 1973.

Q Now in June, 1973, Mr. Ballou, how did you go about obtaining work at the Trading Port?

A I first went earlier, before June, and I spoke with Mr. Solomon but he said he didn't need anyone at the time. And then I believe it was June 2nd, it was on a Saturday, I got a call from Lake Brunelle telling me that Mr. Solomon would like to see me, so I went up and seen Mr. Solomon and he hired me back.

Q Did Mr. Brunelle say anything to you at the time?

MR. BOOKSTEIN: I object --

Q (By Mr. Miller) Do you recall Mr. Brunelle saying anything else?

MR. BOOKSTEIN: I object to any conversation with Mr. Brunelle. There has been no showing that as of June 2nd Mr. Brunelle had any status at all, nor is there anything in the Complaint covering that period.

JUDGE CONSTANTINE: They have a right to show that as of that time he had supervisory agency powers and that they continued until now.

MR. BOOKSTEIN: I have no objection to anything that's going to show Mr. Brunelle's status on that date, but there has been no showing and I don't -- unless Mr. Miller wants to say the purpose of eliciting this conversation is to show

his status on this date, we don't know that.

MR. MILLER: It is to show his status.

JUDGE CONSTANTINE: Go ahead.

Q (By Mr. Miller) Do you recall Mr. Luke Brunelle saying anything else?

A He just mentioned that he put the word in for me and Mr. Solomon would like me to come up and talk to him about coming back to work.

Q Now between the time that Mr. —

JUDGE CONSTANTINE: I see nothing wrong with that. After all, they did ask him, how did you get your job in June, and I think they have a right to show how. I'm not saying that proves anything but it does show that he came back in June. I'll allow that.

Q (By Mr. Miller) When you reported to work, what happened?

A I reported on a Saturday and Mr. Solomon told me I could come back to work and I started the next Monday.

Q Now, Mr. Ballou, do you know whether or not Mr. Brunelle has been involved in the hiring of any employees?

A Just by his telling me as a friend, mentioning it to me.

Q What did he tell you?

A He told me that he -- I was asking him about another friend, a mutual friend of Mr. Brunelle and myself, and —

Q Who is this?

A John Fedele -- and he told me that he had gotten John Fedele a job at the warehouse part-time.

Q And when did he tell you this?

A I couldn't give you the exact date. We were speaking friend to friend -- I couldn't give you a specific date.

Q Do you recall what year it was in?

A Well, it was approximately around the time when I -- just before I went back to work, when I had the talk with Luke.

Q Now are you familiar at all with any of Mr. Brunelle's benefits?

A Well, I know --

Q Yes or no?

A Yes.

Q Okay. Could you tell us which benefits?

MR. BOOKSTEIN: I have no objection to this providing Counsel pinpoints some date.

Q (By Mr. Miller) Well, let's say prior to October 1st, while Mr. Brunelle was a buyer?

A Yes. He made, I think he told me, $200 a week, plus the use of the Company automobile.

Q You say $200 a week. Do you know if he was hourly paid or salary paid?

A Salary.

Q Do you know whether or not he punched a time clock?

A No, he didn't.

JUDGE CONSTANTINE: Let me ask you just one question, to add a humorous note to this. Do you punch a time clock, Mr. Miller?

MR. MILLER: No, I don't.

JUDGE CONSTANTINE: Do you claim you're a supervisor?

MR. MILLER: No, I don't, your Honor, but I think in this case it tends to show supervisory based upon all the other evidence that's already been in, plus Mr. Ballou's testimony.

MR. BOOKSTEIN: We have an artist difference of opinion on that.

Q (By Mr. Miller) Now, Mr. Ballou, did there ever come a time when you, personally, went out on strike?

A Yes, there was.

Q Did you personally picket?

A Yes, I did.

Q And how long did you picket for?

A I picketed for three weeks.

Q Is that the entire length of the strike?

A Right.

Q And did you have any specific shift that you picketed?

A Daily, from noon to 4:00 in the back part of the warehouse.

Q Now, Mr. Ballou, let me direct your attention to on or

about September 13th or 14th. Did you have occasion to speak with a Mr. Isadore Tabachneck?

A Yes, I did.

Q And where was this?

A This was in the rear part of the warehouse while I was picketing.

Q And was anyone else present?

A Ray Valerio and Eddie Kocienski.

Q And who are they?

A Two other employees at the warehouse.

Q Okay. And what did Mr. Isadore Tabachneck say to you, if anything, and you to he?

A He come down in his car and he got out, come over, shook my hand, and then he said, "I want to thank you, you've done me a great favor." He said, "I've been working in this business since I was a boy and I'm ready to get out; I'm over 70," he said, "I'm going to close the place up and go to Florida and retire."

Q Do you recall whether or not he said anything else?

A He said if we got the Union in there, they would just board up the doors and that would be the end of it, no one would work.

Q Okay. Now, Mr. Ballou, I want to direct your attention to September 29th, 1973. Did you attend a Union meeting that day?

A Yes, I did.

Q And did the employees vote to return to work?

A Yes, we did.

Q Now did you, in fact, report to work on October 1st?

A Yes, I did.

Q And what time did you report?

A Well, I got there around ten minutes to seven and I went in around 7:00.

Q And when you went in, did you speak with anyone?

A I walked in; I waited in line, and Avrum Tabachneck was taking names and addresses of the people, and handing out unemployment slips. I asked him if he was going to call the people back by seniority, and he said that he was going to try to.

Q Now, Mr. Ballou, let me direct your attention to on or about October 8th. Did you go to the warehouse that day?

A Yes.

Q For what reason?

A Well, I was at the Union Hall with Richard Leblanc --

Q And who is Richard Leblanc?

A Another employee of Bi-Lo. He lived near me and on the way going towards home, he said he wanted to stop at the warehouse and speak with Avrum Tabachneck. So I waited for him out in the car.

Q And how long did you wait?

A About an hour, at the most.

Q And then what happened, if anything?

A I finally got out and went in to find out if he was going to be much longer, I was going to take the bus home. He was in the office with Avrum Tabachneck and Luke Brunelle and just getting finished. When he got up to leave, Avrum Tabachneck asked me if I would sit down and speak to him for a minute.

Q And did you?

A Yeah.

Q And did a conversation take place?

A Yes.

Q Who was present during this conversation?

A Avrum Tabachneck and Luke Brunelle.

Q Could you tell us, please, what was said, if anything?

A Well, Avrum asked me if I had any idea how the men that were out on strike felt and if I knew how they were going to go in the election. I told him that I wanted the Union myself but I couldn't speak for the other men. And then Luke Brunelle asked me if he could ask me something, and I told him, yes. He asked me if I thought there was any possibility of settling this whole thing without 294, like he mentioned having our own grievance committee, our own shop steward, and I told him as far as I was concerned, no, I didn't think so, but, again, I couldn't speak for the other

people.

Q Do you know whether or not Mr. Leblanc has been rehired?

A Yes, he has.

Q Now, Mr. Ballow, it's already been stipulated that you received the November 1st letter.

A Correct.

Q Prior to receiving that letter which was on November 1st, did you have occasion to phone the warehouse?

A Yes, I did.

Q And did you speak with anyone?

A First I spoke with Luke and I asked Luke if he thought there was any chance of me coming back to work, and he said no, he didn't think so, but he wanted me to speak again to Avrum Tabachneck. So I asked Avrum the same question, and he said no, there was no chance of me ever coming back there, as I can see by the letter, but at that time I had not received the letter in the mail yet.

Q Now, Mr. Ballou, let me direct your attention to November 15th. Did you report to the warehouse on this day?

A Yes, I did.

Q For what reason?

A I had to pick up some clothing I had left there. I was working in the dairy and I had extra clothing there.

Q When you got there did you speak with anyone?

A Yes, I did. I spoke with Avrum Tabachneck again. I

asked him —

Q Where did you speak?

A In the office — in the main office.

Q How did you happen to be in there, the office?

A Oh, I went out of my way. I asked Avrum Tabachneck if I could — if I had enough time put in the job to collect unemployment, and he said I was employed as of November 1st. And then he asked me to come in and talk again; I sat down; and he asked me if I was going to be at the election, and I said I was. He asked me if I was still strong on the Union, was I still going to vote for the Union, and I also said yes, and then he asked me why I wanted the Union, and I told him I worked for another company that had a union and I liked the benefits. And then he asked me, again, about the men on the outside, if I had any idea how they were going to vote and if I thought any of them were doubtful, and I told him I didn't know, I had no idea. And then I got up to leave and as we left, he said to me, "If you can find a way not to come to the election, I'll keep you in mind."

Q Keep you in mind, did he say for what?

A He said for employment after the election.

Q Do you recall anything else that he said?

A He said it doesn't matter how I vote anyway because there would never be a union in there.

Q Did you vote?

A Yes, I did.

Q Was anyone else present for any portion of this conversation?

A Isadore was in, just near the end.

Q Isadore Tabachneck?

A Right.

Q Now, Mr. Ballou, let me direct your attention this time to November 19th, on or about November 19th, did you happen to call the warehouse on this day?

A Yes, I did.

Q Why did you do so?

MR. BOOKSTEIN: I object to that, that is neither material nor relevant as to why he called the warehouse. I do not find that the Complaint mentioned anything on November 29.

JUDGE CONSTANTINE: This is the 19th.

MR. MILLER: The 19th.

JUDGE CONSTANTINE: I don't have the Complaint before me.

MR. BOOKSTEIN: All right. I was getting a little annoyed with that window open.

JUDGE CONSTANTINE: Shall I close the window?

MR. BOOKSTEIN: No, no, it's very pleasant. Thank you. I just misheard the date, that's all.

Q (By Mr. Miller) All right. Now, Mr. Ballou, on the

19th, did a conversation take place when you called?

A Yes, it did.

Q Who did you speak with?

A Avrum Tabachneck again.

Q Okay. Would you relate to us what he said to you and what you said to him, if anything?

MR. BOOKSTEIN: Just a moment; if I may have a minute here.

MR. MILLER: I'm not alleging this, Mr. Bookstein, as violating Section 8(a)(1), but it does go towards the (a)(3) aspect.

Q (By Mr. Miller) Could you, again, relate for us, please, what the conversation was?

A Well, I had found out —

JUDGE CONSTANTINE: No — just the conversation.

THE WITNESS: Oh. Well, I called up as to inquire why Richard Leblanc and Ronald MacGilfrey had been hired back to work ahead of me as I had more seniority than them.

Q (By Mr. Miller) Who had more seniority?

A I had more seniority than them.

Q Okay, continue.

A And Avrum said to me that the reason they hired them back was because they were making less money than I was, and he went and got some kind of sheet of paper, I guess, and told me to wait a second. He came back and told me the

difference on our salary -- in our wage. And then I had mentioned Harry Cone, and he said the reason they had hired him was because they had to have a black person working there. And then when I mentioned John Robinson, who had already been there -- he is also black -- I asked him, I was wondering why because they already had a black man there, and he didn't answer. That was as far as it went.

Q Now, Mr. Ballou, let me direct your attention this time to on or about November the 30th. Were you present at the Orchard Tavern?

A Yes, I was.

Q And where is this tavern located?

A Almost directly across from the warehouse.

Q Okay. And who were you there with, if anyone?

A Jim Dillenbeck and Ira Stockwell.

Q And were any other employees there?

A Frank Houck and Bob Bishop.

Q Were they there -- how long were they there?

A Just through the lunch hour Red Houck was there and Bishop stayed a little longer.

Q Now, on this day, did you have occasion to speak with any representatives of Trading Port?

A Yes. While I was in there Luke Brunelle, Avrum Tabachneck, Isadore Tabachneck, and some other gentleman I don't know came in, and Isadore started the conversation

by taking a check from the gentleman he was with and showed it to me. It was for a large amount of money, and he said, "This is the way to win on the horses," and he was waving it at me. And then he said to me, "Ballou —

JUDGE CONSTANTINE: I might just say that if he's that good, I'd like to have him give me a couple tips, too. I notice everyone is smiling.

THE WITNESS: And then Isadore said to me, he said, "Ballou, you may as well try to make your living on the horses now because you'll never come back to Bi-Lo." And then I heard him tell Jim Dillenbeck, pointing to Frank Houck and Bob Bishop, telling Jim Dillenbeck, that these two men do the work of Dillenbeck or any other three men that he — they do the work of four men. He also said he's not going to have to worry about me or Dillenbeck after Tuesday, and Dillenbeck replied, "We'll see."

Q (By Mr. Miller) Do you recall anything else that he said?

A Yes. Just before Isadore left, he held up his cigar and he said, "We're going to do to you like the —

Q Do to who?

A Me and Dillenbeck, I imagine — directed to me, more or less — he said, "We're going to do to you like the cigar commercial — what is it — White Owl, we're going to get you."

Q Now, Mr. Ballou, at this point let me direct your attention to the day before the election, on or about December 3rd. Did you have occasion at this time to speak with Mr. Luke Bruncile?

A Yes, I did. He called me at my home around 8:30 at night.

Q And did a conversation take place?

A Yes.

Q Could you relate to us what you said to him and what he said to you, if anything?

MR. BOOKSTEIN: Pardon me -- what was that date you mentioned, Mike?

MR. MILLER: December 3rd.

Q (By Mr. Miller) Continue, Mr. Ballou.

MR. BOOKSTEIN: May I have just a minute to find my place here.

(Pause)

MR. BOOKSTEIN: I don't know the purpose of the offer but I don't see any incident in the Complaint, Mr. Examiner.

MR. MILLER: I'll admit it's not specifically alleged in the Complaint, your Honor.

JUDGE CONSTANTINE: Do you offer it as an unfair labor practice or evidence of animosity, or what?

MR. MILLER: I'm offering it as evidence of animosity, plus it goes towards the Objections which were -- the elec-

tion was held the next day.

JUDGE CONSTANTINE: Which Objection?

MR. MILLER: It is, in fact --

JUDGE CONSTANTINE: Which Objection? They only show Objections which the Regional Director has stated shall be heard -- not all of them. Some of them he said would not be. I think Mr. Bookstein is entitled to know which particular one you're referring to.

MR. MILLER: Your Honor, on Page 2 of the "Supplemental Decision and Order Directing Hearing and Order Consolidating Cases and Notice of Hearing."

JUDGE CONSTANTINE: Which is GC --

MR. MILLER: Board Exhibit -- I believe it's labeled 2.

JUDGE CONSTANTINE: All right.

MR. MILLER: It's 2(b).

JUDGE CONSTANTINE: 2(b), all right.

MR. MILLER: It states, "Interviewed and interrogated employees concerning their loyalty to Petitioner and their intentions as to how they would cast their ballots."

JUDGE CONSTANTINE: What's the number on that?

MR. MILLER: Well, let's see --

JUDGE CONSTANTINE: What is the number of the Objection, because all the Objections do not refer to me?

MR. MILLER: It says "The Objections" and then they list Petitioner Objections 1, 3, 4, 5, 6, and 9. It's just

listed in here.

JUDGE CONSTANTINE: Which number is that?

MR. MILLER: That's Objection 5, your Honor.

JUDGE CONSTANTINE: Is 5 one of those which is before me?

MR. MILLER: Yes, it is.

JUDGE CONSTANTINE: All right. You see, I don't have the benefit of that.

MR. BOOKSTEIN: Do I understand, then, that the testimony which Mr. Miller would now propose to elicit, he is seeking to elicit solely in connection with Objection 5 and not in the unfair labor practice charge —

MR. MILLER: No, I haven't said that, Mr. Bookstein.

MR. BOOKSTEIN: I'm asking the question.

MR. MILLER: No. It goes towards showing, certainly, animus, and also --

JUDGE CONSTANTINE: Animus on December 5th won't help me on deciding what happened on September 29th and October 1st.

MR. MILLER: December 3rd. The employees have not been recalled, a great majority of them. Also --

MR. BOOKSTEIN: Well, if he's talking about --

JUDGE CONSTANTINE: Are you offering this on the 8(a)(3)?

MR. MILLER: Yes.

JUDGE CONSTANTINE: All right, then, I'll admit it. It doesn't matter when the date is. I wanted to be sure -- animus is different, but on the merits it's still different, so it's offered on the 8(a)(3) and also on Objection 5, Mr. Bookstein.

Go ahead.

Q (By Mr. Miller) Okay. Now did a conversation take place on December 3rd?

A Yes.

Q Okay. Would you relate to us, please, what was said?

A Luke called me up and asked me on the phone what I thought the outcome of the election, which was going to be held the next day, was going to be, and I told him I didn't know. He said, "The way I got it figured, we're going to win by a landslide," and he started naming names and telling me who was going to vote and who wasn't going to vote, the way he had it figured out, and that's as far as it went.

Q Do you recall anything else?

MR. BOOKSTEIN: The witness has said "that's as far as it went."

JUDGE CONSTANTINE: I know, but he has the right to rack the witness's memory, assuming that the witness needs a little refreshing of his recollection, so I'll allow the question.

MR. BOOKSTEIN: If it isn't as far as it went, I have no

objection.

Q (By Mr. Miller) Okay, do you recall anything else, Mr. Ballou?

A Just naming the names.

Q Now, in regards to naming the names, could you relate to us what exactly happened?

A Well, he'd give me the name of a person and ask me how I thought that person was going to vote, and then telling me how he thought he was going to vote, and so on and so forth down the line.

Q Did you respond?

A To a couple names, I did.

Q Do you recall anything else, Mr. Ballou? Do you recall how the conversation ended?

A No, I don't.

Q Do you recall the mentioning of — well, do you recall the mentioning of the word "friendship?"

A Yes, he — well, he said, "We've been friends for a good long time," he said, "but I'll do anything to protect my job."

JUDGE CONSTANTINE: I'll do anything — I'm sorry, I didn't hear you.

THE WITNESS: He said, "We've been friends for a good long time but I'll do anything to protect my job."

Q (By Mr. Miller) Mr. Ballou, do you recall any of the

names that were mentioned by Mr. Brunelle?

A Just about every one. Just about every name that was eligible to vote.

Q Do you recall the names that you responded to?

A Geez, I don't.

MR. MILLER: Nothing further, your Honor.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: Mr. Ballou, did you give any statement to any representative of the Board?

THE WITNESS: Yes, I did.

MR. BOOKSTEIN: Did you give one or more than one statement?

THE WITNESS: You mean more than one statement in the form of --

JUDGE CONSTANTINE: Did you sign more than one paper?

THE WITNESS: I signed one affidavit.

MR. BOOKSTEIN: And were you interviewed on any occasion other than the one -- that is, interviewed by a Board agent on any occasion other than the occasion when you signed that one paper?

THE WITNESS: Yes, I was.

MR. BOOKSTEIN: And at that time, was any writing done when you were interviewed?

THE WITNESS: Yes.

MR. BOOKSTEIN: And were you shown what was written

down?

THE WITNESS: Yes.

MR. BOOKSTEIN: Were you asked if it was correct?

THE WITNESS: Uh-huh.

MR. BOOKSTEIN: On how many occasions did that occur?

MR. MILLER: Mr. Bookstein, to shorten this, I'll give you everything I have. I'll give you my trial notes, also, as Mr. Sheridan did. I have no objection to it.

MR. BOOKSTEIN: At this time I move for the production of -- for the statements.

MR. MILLER: I have one affidavit from Mr. Ballou, consisting of 3½ pages, and I have my trial brief, which I would be glad to give to Mr. Bookstein.

JUDGE CONSTANTINE: Now wait a minute. On the trial brief, did you read that back to this witness?

MR. MILLER: I did not read this back to the witness, your Honor.

JUDGE CONSTANTINE: All right, then I'm going to rule you don't have to give it unless you want to.

MR. MILLER: I'll give it to Mr. Bookstein.

JUDGE CONSTANTINE: That's up to you, I'm --

MR. MILLER: I have no objection.

JUDGE CONSTANTINE: -- making an expression now. Since he didn't read it back to the witness, there's no confirmation of that trial brief by the witness. All right.

MR. MILLER: I'll give Mr. Bookstein the benefit of my many years of experience.

JUDGE CONSTANTINE: Be back twenty minutes to four, gentlemen. We'll go off the record until then.

(Off the record.)

JUDGE CONSTANTINE: On the record.

MR. BOOKSTEIN: On the direct examination of Mr. Ballou, Mr. Miller was permitted to inquire about a telephone call said to have been made by Mr. Brunelle to Mr. Ballou on December 3, 1973, —

JUDGE CONSTANTINE: Yes.

MR. BOOKSTEIN: — although the Complaint in the case makes no mention of such an incident. And it was stated finally, as I believe the record will show, that it was being offered on the 8(a)(3) and Objection 5 only. I would like to point out that according to Page 2 of the Regional Director's Supplemental Decision and Order Directing the Hearing, it recites that Objections 1, 3, 4, 5, 6, and 9, alleging unlawful conduct between the filing of the Petition and the election are unfair labor practices and are set forth in the Complaint, in Paragraph 6(j) through 6(p), 10, 11, 12, 13, 14, and 15. Now, in fact, the incident that Mr. Miller was permitted to develop at the close of his direct examination is not within any of those paragraphs of the Complaint, it's not within the Complaint, and if this

is not so, we have not been adequately advised of the particular conduct charges against us, and it is our position that it was not at all admissible, either on the Objections or in connection with the 8(a)(3), certainly not on the Objections. Now in connection with the 8(a)(3), it would also be our further position that the discussion -- the telephone conversation, as related by the witness, has no bearing at all.

JUDGE CONSTANTINE: Why isn't it part of Objection 5?

MR. BOOKSTEIN: Because Objection 5, as I read the Supplemental Decision and Order Directing the Hearing, is one of the Objections that has been interpreted by the Regional Director to be conduct alleged in the Complaint, in the specific paragraphs he enumerates there, which occurred during the critical period, and this is not one of those incidents.

JUDGE CONSTANTINE: What's your answer -- I don't have the papers, Mr. Miller, what's your answer?

MR. MILLER: One second, your Honor.

MR. BOOKSTEIN: And on that basis, in the interest of protecting my record, I would respectfully move, Mr. Examiner, to strike the testimony that was elicited concerning the December 3 telephone conversation between Mr. Brunelle and Mr. Ballou.

MR. MILLER: Well, your Honor, certainly there's no

question in my mind that it bears on the 8(a)(3) aspect in that the individuals that Mr. Ballou was interrogated about have not yet been recalled.

JUDGE CONSTANTINE: There's nothing in the conversation to indicate that they won't be. He merely asked him, how do you think they're going to vote.

MR. MILLER: And Mr. Ballou responded to the best of his knowledge.

JUDGE CONSTANTINE: All right.

MR. MILLER: And regarding -- I might add that this came to the Region's attention recently, following the issuance of the Supplemental Decision and Order Directing Hearing. And though the Region feels that the conduct engaged in by Mr. Brunelle would be violative of Section 8(a)(1), it hasn't been specifically included due to the fact the Region did not learn of it until fairly recently; to be specific, it was either Friday or Monday.

JUDGE CONSTANTINE: Which was after the Supplemental report came out in the RC case?

MR. MILLER: Correct.

JUDGE CONSTANTINE: So that obviously the Regional Director couldn't have had this in mind when they referred to that as his Objection 5, or his decision on -- or his reference of Objection 5 to me.

MR. MILLER: He could not have had it in mind, however,

it still bears upon objectionable conduct that was engaged in by the Respondent, and in that case the Employer.

MR. BOOKSTEIN: There must be some minimal requirement of notice to a party charged in one of these situations.

JUDGE CONSTANTINE: I'll grant your motion so that you won't have to meet this on your cross examination or on your defense.

MR. BOOKSTEIN: Thank you, sir.

JUDGE CONSTANTINE: But the evidence may stay in so that the Board will have the benefit of it in case I'm wrong.

MR. MILLER: To what degree are you granting it? Are you saying it does not bear upon the (a)(3)?

JUDGE CONSTANTINE: It doesn't bear upon the (a)(3) or upon the Objections in that Supplemental Report.

MR. BOOKSTEIN: And I would like to say in that connection, and to flush out the motion that you've just granted, just in case it becomes a matter of concern to the Board, that what Mr. Sheridan earlier referred to, and what Mr. Miller more recently referred to as a trial brief turns out to be nothing but a typed proposed examination of the witness, and in connection with the so-called trial brief that Mr. Miller furnished me regarding Mr. Ballou, I would like the Examiner to observe that the December 3 incident that we just referred to, there is nothing that was, obviously, added to this typed proposed direct examination and

handwriting.

MR. MILLER: I just stated that, Mr. Bookstein, that it just recently came to our attention.

JUDGE CONSTANTINE: Well, he did state that. Let's not go into it any further. Both sides have their rights protected; you, Mr. Bookstein, by my granting of the motion; you, Mr. Miller, by my allowing the evidence to stay in for the Board's consideration, but I will not pass upon this. In other words, I will not take it into consideration in rendering my decision. I might say that it does prejudice you because if I credit your other evidence, you'll have a case. I'm not saying that I do credit it, now. I want you to know my mind is open. I will not decide this case until after the close of the case and all briefs are in and I, personally, read the transcript. I always read the transcript very carefully.

So, go ahead on your cross. You don't have to cross on this December 3rd conversation.

MR. BOOKSTEIN: Thank you, sir.

JUDGE CONSTANTINE: Is it too much to ask you this, because some attorneys do not like to leave a witness in the middle of a cross examination overnight, can you try to finish by 5:00, or do you have more than an hour?

MR. BOOKSTEIN: No, I do not believe I will.

JUDGE CONSTANTINE: I say it's an hour -- more than an

hour from 5:00 now. I hope you can because I'd like to adjourn at 5:00.

MR. BOOKSTEIN: All right.

JUDGE CONSTANTINE: I had said originally 6:00, but out of respect for the Reporter, I'd like to finish at 5:00.

MR. BOOKSTEIN: Fine, sir.

CROSS-EXAMINATION

Q (By Mr. Bookstein) Mr. Ballou, when you went to the warehouse on October 8, do you recall approximately what time you got there, what time of day -- I don't mean the hour.

A Oh, afternoon.

Q Afternoon. And do you recall what day of the week it was?

A No, I don't.

Q Do you recall what you had been doing before you went to the warehouse on October 8th?

A I had been up to the Union Hall.

Q And prior to that?

A I went up to the Union Hall early in the morning, around 7:00 in the morning.

Q And when you came to the warehouse, do you recall approximately what time in the afternoon it was, that is whether it was early, mid, or late afternoon?

A Early afternoon.

Q And had you made any stop from the Union Hall to the

warehouse?

A No, I didn't.

Q Had you had anything to eat at noon?

A No, I didn't.

JUDGE CONSTANTINE: Well, I'm going to exclude that on my own. That's not an issue in the case.

Q (By Mr. Bookstein) Well, let me ask you this --

JUDGE CONSTANTINE: Get to the heart of it, Mr. Bookstein. You mean if he didn't eat, it would mean one thing, and if he ate, it would be another?

Q (By Mr. Bookstein) Getting to the heart of it, Mr. Ballou, had you had anything intoxicating to drink before --

MR. MILLER: I object, your Honor, as to being totally irrelevant.

MR. BOOKSTEIN: I would appreciate it if Mr. Miller would let me complete my question before he objects it.

JUDGE CONSTANTINE: All right.

MR. MILLER: All right, I'll withdraw the objection for the time being, Mr. Examiner.

JUDGE CONSTANTINE: Go ahead. Repeat the question, please.

Q (By Mr. Bookstein) My question, quite directly, Mr. Ballou, is whether you had anything of an intoxicating nature to drink on October 8th, prior to going to the warehouse?

A I did not.

MR. MILLER: I -- well, I'll let the witness's answer stand.

JUDGE CONSTANTINE: All right. His answer is "no."

MR. BOOKSTEIN: I heard him.

JUDGE CONSTANTINE: I didn't get a chance to pass on the objection. I won't say what I would have done on the objection.

Q (By Mr. Bookstein) Again, Mr. Ballou, on November 15, when you went to the warehouse, can you tell me approximately what time of day it was?

A Approximately the same time of day.

Q And again, Mr. Ballou, prior to your having gone to the warehouse on November 15, did you, on that day, have anything intoxicating to drink?

MR. MILLER: I object at this point, your Honor. It's totally irrelevant.

JUDGE CONSTANTINE: I'll sustain the objection.

MR. BOOKSTEIN: I would like to say, Mr. Examiner, that I can't think of anything that would bear more on the witness's, either ability to comprehend and repeat what was said in the conversation, on the one hand, if he was under the influence, or his credibility, on the other hand, if he --

JUDGE CONSTANTINE: That's part of your defense. You

put it on as part of your defense. You're going beyond the direct.

MR. BOOKSTEIN: I'll abide by your ruling, sir.

Q (By Mr. Bookstein) Now, on November 30, Mr. Ballou, at the Orchard Tavern, in the event that you described there, had you on that occasion had anything intoxicating to drink?

MR. MILLER: I'll object once again, your Honor.

JUDGE CONSTANTINE: I'll sustain it for the same reason, but I'm prejudice to your bringing it out on your case as part of your defense.

MR. BOOKSTEIN: Thanks.

Q (By Mr. Bookstein) Mr. Ballou, when you had some contact with Mr. Isadore Tabachneck on the picket line, isn't it a fact that Mr. Tabachneck said to you in words or substance that he was going to retire and get out of the business?

A That is the truth.

JUDGE CONSTANTINE: This was Isadore?

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: Thank you.

Q (By Mr. Bookstein) You had known Mr. Isadore Tabachneck for about how long?

A Five years, approximately.

Q Did you know him to be a man who engaged in small talk?

A Yes.

Q Did he like to tell a joke?

A I don't know about that. I never —

Q Do you know what a "kibitzer" is?

A No, I don't.

JUDGE CONSTANTINE: Let the record show that I don't know either. Everybody is smiling.

MR. BOOKSTEIN: I have an overdue promise to —

JUDGE CONSTANTINE: To let me know.

MR. BOOKSTEIN: — to let you know.

JUDGE CONSTANTINE: I again want to say that when I took Latin in high school, and college also, we didn't have the word "kibitz" in this —

MR. BOOKSTEIN: I don't think I've heard it that that's Latin.

JUDGE CONSTANTINE: I don't think it is either. Everybody is smiling in the room, how about that. Some of the tension has been relieved.

Q (By Mr. Bookstein) At the Orchard Tavern, you say there was some discussion about betting and racetracks?

A Not really discussion. He just held up a check and said, "This is how you make good money at the races."

Q Was that said in a light, joking manner?

A More or less.

Q Had you, prior to November 30th, at the Orchard Tavern

ever made it known to Isadore Tabachneck that you were known to bet on the horses?

A He knew it. He's known it for a long time.

Q When he spoke to you about going out and trying to win yourself some money on the horses, was that said in a jocular way on the 30th?

A No, I don't think so.

Q When, on November 30th, as you have testified, Mr. Isadore Tabachneck referred to the White Owl cigar commercial, had you previously seen that commercial on TV?

A Yes, I did.

Q That 1971 layoff you referred to, do you recall how many persons were laid off?

JUDGE CONSTANTINE: I'm not going to go into that. The only question is, they introduced that to show that there was some semblance of seniority; not on the question of whether he was properly or improperly laid off. You may go into the question of seniority. I don't care how many were laid off — or at least that's how I interpreted it. If there is any other interpretation, I will exclude it. I allowed it only on the question of seniority.

Q (By Mr. Bookstein) In your visit to the warehouse on November 15, Mr. Ballou, where at the warehouse do you say you met and had this conversation?

A First it was just in, like a hallway going between the

coffee room and the office, and I went into the office — into Isadore —

Q By the "office" — I want to make sure we know what we're talking about. What space do you mean you went into?

A There's a walkway that goes right through where the girls are — where the machines are — it goes into the coffee room. It's like — it's not a hallway, it's all open, but —

Q An open office?

A Right across from Luke's desk.

Q And on that November 15 visit, how many people were in that open office?

A I don't know — I think maybe two.

Q Do you remember who they were?

A Luke was there, for one, he was sitting at his desk.

Q And who else?

A I can't really remember if the other fellow that has a desk behind Luke's was there or not.

Q Who is that?

A I don't know his name — I mean I can't think of it offhand. I know him but —

Q Did you know John Fedele?

A Yes.

Q Isn't it a fact that John Fedele was, while he was working at Trading Port, employed in a full time job at a

bond house?

A I believe so.

Q And that the work he performed at Trading Port was performed only evenings and Saturday?

A Correct.

Q Isn't it a fact, Mr. Ballou, that in the signed statement you gave the Board, with reference to the events of October 1, 1973, in your reporting back to the office, the only thing you related that Avrum Tabachneck said was that if they needed us, they would call?

A That is the day when I went to pick up my unemployment check.

Q Yes. Isn't it a fact that when you gave the Board this signed statement, that was all you quoted Avrum Tabachneck as saying?

JUDGE CONSTANTINE: Let him see the affidavit.

MR. BOOKSTEIN: And I call your particular attention to number Paragraph 8.

(Document shown to witness.)

THE WITNESS: Correct.

Q (By Mr. Bookstein) Is it correct to say that when you were interviewed by the Board representatives and gave your signed statement, Mr. Ballou, there was no mention by you of Mr. Avrum Tabachneck saying anything on October 1 about seniority?

A No, it's not on there, no.

MR. BOOKSTEIN: I have no further questions.

MR. MILLER: Nothing, your Honor.

JUDGE CONSTANTINE: All right, you may step down, Mr. Ballou.

(The witness was excused.)

MR. BOOKSTEIN: May the record show I am returning to Mr. Miller the two documents he provided me.

(Documents handed to Mr. Miller.)

MR. MILLER: Thank you.

JUDGE CONSTANTINE: I direct the record may show that.

MR. MILLER: I call to the stand Mr. Ira Stockwell.

Whereupon,

IRA STOCKWELL

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please give your name and address for the record.

THE WITNESS: Ira Stockwell, 422 Sand Creek Road, Apartment 203.

DIRECT EXAMINATION

Q (By Mr. Miller) Mr. Stockwell, did you ever work at Trading Port, Inc.?

A Yes, I did.

Q For approximately how long?

A Eight to nine years.

Q And would you tell us what you were last employed as?

A Truck driver and a warehouseman.

Q Mr. Stockwell, were you in the room when Mr. Dillenbeck testified about your card?

A Yes.

Q Is this the card that you filled out?

(Card shown to witness.)

THE WITNESS: That is correct, sir.

Q (By Mr. Miller) And how did it happen that — I notice there is no signature on there?

A I had thought that I signed the card. I filled the card all out and I thought that I had signed the card.

JUDGE CONSTANTINE: You're referring to GC what now — is this in evidence?

MR. MILLER: Yes, it is, your Honor.

JUDGE CONSTANTINE: All right. The record ought to be clear so whoever reads the record will know what you're talking about — GC what?

MR. MILLER: Mr. Stockwell's card.

JUDGE CONSTANTINE: Isn't there a number on it?

MR. MILLER: I'm sorry, your Honor — GC, No. 3(c).

JUDGE CONSTANTINE: All right. In other words, you're asking him about GC No. 3(c)?

MR. MILLER: Correct.

JUDGE CONSTANTINE: Which is in evidence?

MR. MILLER: Correct.

JUDGE CONSTANTINE: All right.

Q (By Mr. Miller) Now, Mr. Stockwell, let me direct your attention to on or about September 1st. Did you have occasion at this time to speak with Mr. Robert Solomon in the warehouse?

A Yes, I did.

Q Where did the conversation take place?

A At his desk inside the warehouse.

Q How did it happen to come about?

A He called me over to his desk.

Q Could you relate to us, please, what Mr. Solomon said to you and what you said to him, if anything?

A Mr. Solomon said to me, "What do you think about the Union?" I said, "I would like the Union to represent me." He said, well, no matter which way the case went, if we voted for the Union or voted against the Union, I'd have a chance of losing my job, no matter which way the case went, I stood a chance of losing my job.

Q Mr. Stockwell, did there come a time when you went on strike?

A Yes, I did.

Q Did you go on strike when the rest of the Union men

went on strike?

A Yes, I did.

Q Did y a picket?

A Yes, I did.

Q Did you picket any particular shift?

A 8:00 to 12:00 — from 8:00 in the morning to 12:00 noon.

Q And, Mr. Stockwell, what procedures did you follow in determining who would picket — on what location you would picket?

A Well, we alternated, three men in the front, three men in the back, so every day we alternated our positions. One day we'd be in the front of the warehouse, the next day we'd be in the back of the warehouse.

Q And how long did you picket?

A All the way through the strike.

Q Now, Mr. Stockwell, during the time that you were picketing, did you ever have occasion to speak with Mr. Isadore Tabachneck?

A Yes, I did.

Q On how many occasions?

A Four or five occasions.

Q Could you relate to us, please, what, if anything, was said and by whom?

A Well, on one occasion —

JUDGE CONSTANTINE: Was it always the same conversation?

THE WITNESS: More or less, yes.

JUDGE CONSTANTINE: All right.

THE WITNESS: On the one occasion he came out and he wanted to know why I was picketing. He said, "I don't know what you're out here for. You stand no chance of getting back in." He said, "Furthermore, before I'd let a union in the warehouse, I would padlock the warehouse." On another occasion he said to me, if I would like to put the padlocks on the door with him, I could ride around in the car and put the padlocks on the door with him.

Q (By Mr. Miller) Can you recall anything else?

A No. More or less he just kept coming out on these four or five occasions; he just said that we had no chance of getting back in the warehouse, and he did not want a union in the warehouse.

Q Did he say why — why you didn't have any chance of getting back in?

MR. BOOKSTEIN: I do think that Counsel should not lead his witness this early in the game.

JUDGE CONSTANTINE: The fact that he said they have no chance of getting back in, if I credit it, will establish one of the allegations, one or more, so you don't have to ask him why he said it. I'll sustain the objection. The statement, however, I will allow to stay in.

MR. BOOKSTEIN: My motion — my objection didn't go to

the statement.

JUDGE CONSTANTINE: Yes, I understand that.

Q (By Mr. Miller) Now, Mr. Stockwell, did you attend the September 29th meeting when the men voted to return to work?

A Yes, I did.

Q Did you report to work on October 1st?

A Yes, I did.

Q And what, if anything, happened -- what time did you report to work?

A Oh, around 7:00 o'clock in the morning.

Q And what, if anything, happened when you reported to work that day?

A Izzy Tabachneck was inside the door as I walked into the warehouse and he told me to see Avrum for a layoff slip.

JUDGE CONSTANTINE: I can't hear you. Can you speak a little louder?

THE WITNESS: Yes. Izzy Tabachneck told me to report to Avrum Tabachneck for a layoff slip, there was no work.

Q (By Mr. Miller) And did you, in fact, report to him?

A Yes, I did.

Q And did a conversation take place?

A He gave me a layoff slip and he said if anything came up, he would notify me, he had my telephone number.

Q Have you ever been recalled?

A No, I haven't.

MR. MILLER: Nothing further, your Honor.

MR. BOOKSTEIN: Mr. Stockwell, did you give any statement to a representative of the Labor Board?

THE WITNESS: Yes, I did.

MR. BOOKSTEIN: One or more than one?

THE WITNESS: One.

MR. BOOKSTEIN: I would move for the production of that statement, if I may, Mr. Examiner.

JUDGE CONSTANTINE: Motion granted.

MR. MILLER: Let the record show, please, that I am turning over to Mr. Bookstein the statement of six hand-written pages.

JUDGE CONSTANTINE: All right. In view of the fact that I'd like to finish with this witness by 5:00, I'm going to leave it to you how long you think you'll want to examine that document, because you know how long you'll take on cross-examination. How much time do you want? I assume this is the last witness.

MR. BOOKSTEIN: I would like ten minutes, and I don't anticipate any difficulty in meeting your time table.

JUDGE CONSTANTINE: All right, ten minutes. Off the record for ten minutes.

(Off the record.)

JUDGE CONSTANTINE: On the record, please.

Go ahead, Mr. Bookstein.

MR. BOOKSTEIN: I have no questions to ask of Mr. Stockwell.

JUDGE CONSTANTINE: All right. You may step down, Mr. Stockwell.

(The witness was excused.)

MR. BOOKSTEIN: I would like the record to show that I am returning the statement to Mr. Miller.

JUDGE CONSTANTINE: All right, the record may show that. Since we've made very good progress today, I'm inclined to reverse myself and say let's adjourn now. If there is any opposition, I will respect the opposition and proceed.

MR. SHERIDAN: I have no opposition, your Honor, since we don't have any more witnesses here to call.

JUDGE CONSTANTINE: How about Mr. Pozefsky?

MR. POZEFSKY: I have no opposition.

MR. BOOKSTEIN: In light of Mr. Sheridan's statement, I, of course, am opposed.

(Laughter)

JUDGE CONSTANTINE: That's the first thing -- we'll adjourn in a moment -- what time do you want to come in tomorrow? Let's put in a full day tomorrow because it'll do some good.

MR. BOOKSTEIN: I'd certainly like, sir, not to come in any earlier than 9:30.

JUDGE CONSTANTINE: All right. The reason I say that,

let's make a full day out of it, is because we won't be here Friday because you can't make it, Mr. Bookstein, and no one's objected to a recess beginning late Thursday afternoon.

MR. SHERIDAN: Your Honor, the only problem I have, and I'm going to try to do my best to change it, the witnesses are subpoenaed for 10:00 o'clock. We'll try to get ahold of one and get him in here at 9:30.

JUDGE CONSTANTINE: Well, if you want to meet at 10:00, I don't care. I just want to accomplish as much as we can. I leave it to you. Do you want to go a little later tomorrow, let's say somewhere around 5:00 o'clock? I usually quit between 4:00 and 4:30. I'll go to 5:00 if necessary, a little beyond 5:00, so that we can put in a full day. Do you want to adjourn until 10:00 o'clock tomorrow? I leave it to the lawyers.

MR. BOOKSTEIN: I'm happy to do whatever suits the convenience of you, Mr. Examiner, and of Mr. Sheridan. I don't really care.

JUDGE CONSTANTINE: When you say "anything that suits the convenience of me" -- I'll go by what the lawyers say. It's up to Mr. Sheridan and Mr. Pozefsky.

MR. BOOKSTEIN: If Mr. Sheridan has got people subpoenaed for 10:00 and would rather leave it that way, I have no objection.

JUDGE CONSTANTINE: All right. How about Mr. Pozefsky?

MR. POZEFSKY: No, I have none.

JUDGE CONSTANTINE: All right, then, we'll adjourn now until --

MR. SHERIDAN: Your Honor, before we do, can I make just one more request for a stipulation. I haven't discussed it with Mr. Bookstein but I'm sure there will be no problem.

JUDGE CONSTANTINE: All right, let's go off the record for five minutes, discuss it with him, and then come back and let me know.

MR. SHERIDAN: It will only take about one minute.

JUDGE CONSTANTINE: All right, off the record for one minute.

(Discussion off the record.)

JUDGE CONSTANTINE: On the record. Is this the RC Petition?

MR. SHERIDAN: Yes, your Honor.

MR. BOOKSTEIN: Yeah, that's it.

MR. SHERIDAN: Your Honor, I --

JUDGE CONSTANTINE: What's the stipulation, that the RC Petition was filed --

MR. SHERIDAN: On October 1, 1973.

JUDGE CONSTANTINE: All right, that's a stipulation. I assume Mr. Bookstein agrees to it; Mr. Sheridan does. How

How about Mr. Pozefsky?

MR. POZEFSKY: I agree.

JUDGE CONSTANTINE: All right, then, that's a stipulation.

If there's nothing further, I'm going to adjourn at this time to 10:00 o'clock tomorrow morning.

(No response.)

JUDGE CONSTANTINE: All right, to which time and place we now stand adjourned.

(Whereupon, at 4:30 p.m., the hearing was adjourned, to reconvene at 10:00 a.m., Thursday, March 7, 1974, in the same place.)

FIRST COPY

OFFICIAL REPORT OF PROCEEDINGS

BEFORE THE

National Labor Relations Board

DOCKET NO. 3-RC-5853
3-CA-5506

IN THE MATTER OF:

TRADING PORT, INC.

Respondent

-and-

LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner

PLACE: Albany, New York

DATE: Thursday, March 7, 1974

PAGES: 272 - 407

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

Third Region

In the Matter of:	
TRADING PORT, INC.	
Respondent	
-and-	Case No. 3-RC-5853
LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	
Petitioner	
TRADING PORT, INC.	
-and-	Case No. 3-CA-5506
LOCAL 294, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA	

Hearing Room
The Standard Building
11th Floor
112 State Street
Albany, New York

Thursday, March 7, 1974

The above-entitled matter came on for further hearing, pursuant to adjournment, at 10:00 a.m.

BEFORE:

Honorable JAMES V. CONSTANTINE, Administrative Law Judge

APPEARANCES:

THOMAS J. SHERIDAN, Esq. MICHAEL MILLER, Esq.	National Labor Relations Board, Third Region, 112 State Street, Albany, New York; appearing as Counsels for the General Counsel.
EDWARD L. BOOKSTEIN, Esq.	Kohn, Bookstein & Karp 100 State Street Albany, New York; appearing on behalf of the Respondent.
WILLIAM POZEFSKY, Esq. DOMINIC TOCCI, Esq.	Pozefsky, Tocci & Pozefsky 112 State Street Albany, New York; appearing on behalf of the Charging Party.

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PROCEEDINGS

10:00 a.m.

JUDGE CONSTANTINE: On the record. The trial will please come to order.

Please proceed, Mr. Sheridan or Mr. Miller, whichever one has the next witness.

MR. SHERIDAN: Yes, your Honor. Before I proceed with my next witness, I would like to make a statement on the record with regards to Mr. Peasley.

I was informed this morning, for the first time -- I wasn't aware of it -- that Mr. Peasley, I guess two or three years ago, lost his wife, and this may have had some effect on the way he acted yesterday on the stand.

I am respectfully requesting that the Judge reverse his ruling with regards to permitting Mr. Peasley to testify and be a party to the case as a discriminatee.

JUDGE CONSTANTINE: Well, here's what I'm going to do. If there's no opposition, I'll grant the motion. If there is, I will take it under consideration while I'm gone next week. As you know, we're not meeting tomorrow.

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: And will pass on it. Now, do you want me to pass on it and send you a written decision granting or denying the motion, or do you want to wait until I come back and do it on the record here? In other words,

would you like to know in advance a day or two so that you can put him on, that's what I'm asking?

MR. SHERIDAN: Yes, that's the idea. It would be better that way. Then I would be able to get ahold of him.

JUDGE CONSTANTINE: All right. I'll have to wait, now. You indicated you would oppose a motion, Mr. Bookstein?

MR. BOOKSTEIN: Yes, sir, and I would like to make a brief statement.

JUDGE CONSTANTINE: Yes, sir, of course. I will consider all these things in determining my disposition on the motion which will be made next week. I will take it under consideration.

MR. BOOKSTEIN: I have genuine respect for Mr. Sheridan's ability as a lawyer and as a labor law practitioner. I do not have any information which leaves me to think he possesses any expertise in psychiatry or psychology.

The statement has been made that two or three years ago Mr. Peasley lost his wife. That stands alone; there is absolutely no basis for concluding that that tragedy had anything to do with his unpardonable conduct in this hearing. And if my conduct should not be up to par at some point during the hearing, I could point to some personal tragedies in my life of much more recent vintage than Mr. Peasley's; and I oppose this motion.

JUDGE CONSTANTINE: I'll tell you what's troubling me,

gentlemen. You can argue that further on the record now or later in the day, or you can send the briefs, but the briefs should come immediately because about next Wednesday or Thursday I want to decide this -- give you a written statement deciding it so you will have a couple of days in which to appeal to the Board before I come back, whoever loses.

The thing that troubles me is not so much that I dismissed him from -- refused to let him come back. That doesn't bother me at all. I believe his conduct was such that I was justified, but he is one of the (a)(3)'s; I don't want to hurt his rights on a (a)(3). If it's possible to sever him -- I don't know what the answer is -- if it's possible to sever him and let some other trial examiner hear him, all right, but I don't want to prejudice his right to be reinstated, assuming there is merit to his case, and I'm not pre-judging the case; I'm not saying that he or any other (a)(3) who has testified so far is entitled to be reinstated. That's the only thing that is bothering me.

I am not disturbed by the fact that his conduct -- that I decided that his conduct warranted not allowing him to come back. I don't want to hurt his rights to reinstatement, assuming there is merit to it.

MR. BOOKSTEIN: I would assume, Mr. Examiner, that you would accord Mr. Peasley the same treatment as you ultimately decide should be accorded to anyone else in his same position,

and I think the issue here is not that. I think the issue is -- you are simply, in my judgement, being asked to reverse the action you took yesterday, and you're being asked to do it on the ground that I can only term --

JUDGE CONSTANTINE: Let me ask you this -- I didn't quite understand that argument. Your argument is that if I find that these other (a)(3)'s are entitled to reinstatement, I may find that he is also?

MR. BOOKSTEIN: I'm saying --

JUDGE CONSTANTINE: Is that agreeable to you?

MR. BOOKSTEIN: I'm saying that I have confidence that his performance yesterday will not prejudice you in your handling of the whole 8(a)(3) issue, and I don't think that there is anything required in the way of testimony by Mr. Peasley to -- for you to come to a conclusion ultimately on that issue. And I think that really all this is, is a motion for you to reverse the position you took yesterday, and the ground stated is no ground at all in my judgement.

JUDGE CONSTANTINE: As I said, I'm not disturbed by the fact that I excluded him from further testifying on that part of the case, which is 8(a)(1). I'm not disturbed about that, but I don't want to prejudice his rights to reinstatement if -- if you will make a statement now, then I will dispose of the motion immediately if you can make this statement, that I can consider his evidence, which he has testified so far,

together with other evidence in the case, solely on the question of whether he's entitled to reinstatement and not on the question of whether 8(a)(1) has been committed. If you are of that opinion, I will dispose of the motion right now, otherwise I will have to consider it. As I said, I don't want to prejudice his rights.

MR. BOOKSTEIN: I am of that opinion.

JUDGE CONSTANTINE: You are of that opinion?

MR. BOOKSTEIN: Yes. And, of course, in this, I do not concede that either Mr. Peasley or anyone else who is entitled to --

JUDGE CONSTANTINE: No, no, no --

MR. BOOKSTEIN: -- reinstatement or --

JUDGE CONSTANTINE: -- but if they are, I may consider him, also, on the question of reinstatement.

MR. BOOKSTEIN: That's correct.

JUDGE CONSTANTINE: All right, then, in that case I'll deny the motion, because, at most, he would come back to testify on 8(a)(1). I think he's testified as to 8(a)(3).

MR. SHERIDAN: Your Honor, could I just ask one additional question --

JUDGE CONSTANTINE: I haven't finished.

MR. SHERIDAN: I'm sorry.

JUDGE CONSTANTINE: And I will reinstate -- I said I'd strike his testimony -- I will reinstate his testimony only

on the issue of his reinstatement, not on the question of 8(a)(1).

All right, now, go ahead.

MR. SHERIDAN: Yes. I just wanted to ask one thing. During the course of his testimony, Mr. Peasley did verify one card, as you will recall.

JUDGE CONSTANTINE: Yes.

MR. SHERIDAN: Would that reinstatement of his testimony apply to that card?

MR. BOOKSTEIN: May I have just one moment here?

JUDGE CONSTANTINE: All right. I'll state on the record that I shouldn't think it would because you have already established a majority, and I see some more cards on your desk.

MR. SHERIDAN: Well, I would like to get them all in.

JUDGE CONSTANTINE: If I find a majority, why are you disturbed about one card? You've got far more than one over a majority. I counted yesterday 35 cards, and a majority is 24, the unit having 47 in it. But you ask Mr. Bookstein about that.

MR. BOOKSTEIN: What is the question?

MR. SHERIDAN: The question I asked was whether or not his testimony could be allowed to stand insofar as he verified one card? He verified Mr. Harter's card.

MR. BOOKSTEIN: Yes, I have no objection.

JUDGE CONSTANTINE: All right, then, I will consider that also, but I will not consider his testimony on any 8(a)(1) issue.

All right, that disposes of the motion and I will not have to take it under consideration.

MR. SHERIDAN: Just so the record is clear, I still --

JUDGE CONSTANTINE: Your rights are protected.

MR. SHERIDAN: Yeah -- I object to the fact that he isn't permitted to testify. Okay.

I'd like to call Michael Scanlon, please.

Whereupon,

MICHAEL SCANLON

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Would you be good enough to give your name and address to the Reporter so we can have it for the record?

THE WITNESS: Michael Scanlon 21 Gardner Terrace, Delmar, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Scanlon, did you ever work for Trading Port, Inc.?

A Yes, I did.

Q And when did you start working for them?

A I believe it was February of 1969.

Q And what was your job?

A I was an order selector, checker, truck loader.

MR. SHERIDAN: Would you mark this for identification, please, as General Counsel's Exhibit --

JUDGE CONSTANTINE: That will be 11, I guess.

MR. SHERIDAN: General Counsel's Exhibit 11, please.

JUDGE CONSTANTINE: Is there an a, b, or c to it, or just plain 11?

MR. SHERIDAN: No, your Honor.

(The document above referred to was marked General Counsel's Exhibit No. 11 for identification.)

Q (By Mr. Sheridan) Mr. Scanlon, I'll show you what's been marked for identification as General Counsel's Exhibit 11, and ask you if you've seen it before?

(Document shown to witness.)

THE WITNESS: Yes, I have.

Q (By Mr. Sheridan) And I'll direct your attention to the date that appears on the card. Is that the first time you saw it?

A Yes, it is.

Q And who gave you the card?

A Fowler Riddick.

JUDGE CONSTANTINE: I'm sorry, I didn't hear you.

THE WITNESS: Fowler Riddick.

JUDGE CONSTANTINE: All right, thank you.

MR. SHERIDAN: R-i-d-d-i-c-k.

Q (By Mr. Sheridan) And what, if anything, did he say to you when he gave you the card?

MR. BOOKSTEIN: I object to this as hearsay.

JUDGE CONSTANTINE: Do you question the validity of the card?

MR. BOOKSTEIN: No.

JUDGE CONSTANTINE: You don't -- oh, then I'll sustain the objection.

Q (By Mr. Sheridan) Did you fill out the card yourself, Mr. Scanlon?

A Yes, I did.

Q The front and back?

A Yes.

Q And did you read it before you filled it out?

A Yes, sir.

Q I notice there's no signature on the bottom of the front card. What is the reason for that?

A I just forgot -- I didn't notice it in filling out the other items.

Q Okay.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibit 11.

MR. BOOKSTEIN: May I ask one preliminary question?

JUDGE CONSTANTINE: Go ahead -- on voir dire.

VOIR DIRE EXAMINATION

Q (By Mr. Bookstein) Mr. Scanlon, if you had noticed the signature line, you would have signed it, wouldn't you?

A I would have.

MR. BOOKSTEIN: I have no objection to the card.

JUDGE CONSTANTINE: All right, it may be received in evidence. Mark it received, Mr. Reporter.

(The document, heretofore marked General Counsel's Exhibit No. 11, was received in evidence.)

DIRECT EXAMINATION CONTINUED

Q (By Mr. Sheridan) Now, Mr. Scanlon, did you go on strike when the other employees did?

A Yes, I did.

Q Did you picket during the strike?

A No, I didn't.

Q All right. Now on or about September 30th, did you receive a call from Mr. Dillenbeck?

A Yes, I did.

Q As a result of that call, what, if anything -- oh, it's been -- excuse me, it's been stipulated that you returned to work -- excuse me -- that you offered to return on October 1, 1973. When you did go in that day who did you talk with?

A When I went in to work on October 1st, that was --

JUDGE CONSTANTINE: In case you don't remember, October 1st was after the strike was over.

THE WITNESS: That was the day of the layoff, right?

Q (By Mr. Sheridan) Right. What happened when you went in?

A I went in and stopped at a desk where Avrum Tabachneck was typing up layoff slips.

Q And what, if anything, did he say to you?

A He just took the information he needed for the layoff slip, and that was it.

Q Okay. And what did he do with the layoff slip?

A I took the slip --

Q You mean he gave it to you?

A Right, he gave me the slip.

Q All right, Mr. Scanlon, I'll direct your attention to on or about November 9th, and ask you if you received a phone call that evening from Mr. William Stevens?

A Yes, I did.

Q Did you have a conversation with him?

A Yes, sir.

JUDGE CONSTANTINE: I know who he is but for the record why don't you have him identify Stevens?

Q (By Mr. Sheridan) Who is Mr. Stevens?

A Mr. Stevens was a manager of one of their stores. At the point I talked to him, I guess he was out sick for quite

some time.

Q All right. What was the conversation? What did he say to you and what did you say to him, if anything?

MR. BOOKSTEIN: Well, I object to that, Mr. Examiner, on the grounds that you've already ruled that to this point, as a matter of law, the General Counsel has failed to establish that Mr. Stevens had either agency or supervisory status, and, therefore, any conversation he may have had with Mr. Scanlon would not be binding on this Respondent.

JUDGE CONSTANTINE: I will allow it if he can establish it, but I think you have to establish agency or supervisory status. The fact that he's a manager of a store doesn't automatically make him a supervisor.

MR. BOOKSTEIN: He was not -- the testimony does not show that. The testimony shows that two years before he had been a manager of a store.

JUDGE CONSTANTINE: And at the time that he was ill, as I recall, that's what my notes show.

MR. SHERIDAN: That's the same Mr. Stevens that we have tried to elicit testimony about before.

JUDGE CONSTANTINE: All right. I'll sustain the objection, without prejudice in allowing the Charging Party and the General Counsel to establish his agency or his supervisory status, or both.

MR. BOOKSTEIN: Right. My objection is, until that is

done, any conversation between Stevens and anyone else would not be binding on this Respondent, and, therefore, would be incompetent.

JUDGE CONSTANTINE: That's right, sir, I learned that in law school.

MR. SHERIDAN: Your Honor, could I just, at this point, cite a couple of cases in support of our position?

JUDGE CONSTANTINE: Go ahead.

MR. SHERIDAN: All right. The cases that I am citing are Primrose Supermarket of Salem, Inc., 171 NLRB 1028 at 1036 --

JUDGE CONSTANTINE: One is enough, if that's in your --

MR. SHERIDAN: Okay.

JUDGE CONSTANTINE: 1028 at --

MR. SHERIDAN: At 1036.

JUDGE CONSTANTINE: Bring it in, will you, please?

MR. SHERIDAN: In that case, your Honor, the Board found a particular individual to be an agent, though it was not established that he was a supervisor, and the language used was that the Respondent " authorized, ratified, and encouraged the conduct." This is the test they used, "or acted in the manner as to lead employees reasonably to believe that they were acting for and on behalf of management."

JUDGE CONSTANTINE: But in that case, even though I

haven't read it, they were employees -- I mean they were in the unit or in the plant. This fella was outside the unit and outside the plant. He's a store manager.

MR. SHERIDAN: Well, could I just continue, your Honor?

JUDGE CONSTANTINE: I can't draw any such inference.

MR. SHERIDAN: Well, I just want to continue, that one of the factors that the Board looked to in determining whether or not this particular individual was an agent was that the Respondent had engaged in conduct paralleling that of the employee, whose conduct General Counsel has figured was attributable to Respondent.

JUDGE CONSTANTINE: I can understand that but that's because he was in the plant. This says, "Respondent, at least tacitly, authorized, ratified, or encouraged the conduct in which Wilcox -- the supervisory in question -- engaged or acted in such manner as to lead employees reasonably to believe that he was acting for and on behalf of management."

Well, if you establish that, go ahead, but you've got to establish it before you introduce any evidence as to the conversation.

MR. SHERIDAN: Well, your Honor, if you will read on, the Board also points to the other portion that I referred to in terms of Respondent having engaged in conduct similar to that engaged in by the alleged agent.

JUDGE CONSTANTINE: You better show it to me, I don't see it. Read it into the record.

MR. SHERIDAN: Following the statement that you made, your Honor, there are cases cited, and then the Board said this -- or the Judge said it, it was adopted by the Board: "That the cases on which Respondent relies, holding that employer was under no duty to repudiate the employee's conduct, as well as other cases cited by Respondent, are distinguishable in that those cases did not involve situations in which Respondent had been previously found to have engaged in unfair labor practices which included conduct paralleling that of the employee's whose conduct is found to be attributable to Respondent here."

What we're saying is that we have other conduct --

JUDGE CONSTANTINE: There is nothing that -- I have made no finding ---

MR. SHERIDAN: No, no, I understand that, your Honor.

JUDGE CONSTANTINE: -- that decreed that Respondent previously engaged in unfair labor practices.

MR. SHERIDAN: I understand that, your Honor, but, of course, obviously, we're seeking to have that finding made, and we're alleging certain conduct by admitted agents of Respondent as (a)(1); that what I'm saying is that if Mr. Stevens engaged in conduct similar to that engaged in by Respondent, and if that conduct should be found to be (a)(1),

that it's reasonable to conclude that he was acting as an agent of the Respondent.

MR. BOOKSTEIN: That is the poorest argument on evidence I think I've ever heard.

JUDGE CONSTANTINE: Now wait a minute. I'll adhere to my decision -- my ruling.

MR. SHERIDAN: Okay.

JUDGE CONSTANTINE: But I want to make it clear why; even assuming that has some bearing on the case, it's only with respect to someone in the plant. This fella, admittedly, is not in this plant, he's in one of Respondent's stores which are not in the unit.

MR. BOOKSTEIN: Not even in one of Respondent's stores. He was in one of Respondent's stores years before.

JUDGE CONSTANTINE: All right. I'll adhere to my ruling.

MR. SHERIDAN: All right. Could I just make an offer of proof as to what he would testify to?

JUDGE CONSTANTINE: Of course.

MR. BOOKSTEIN: I object --

JUDGE CONSTANTINE: I can't stop offers of proof. I did once and the Board reversed me.

MR. BOOKSTEIN: I would like at least to state for the record that I think this device of making offers of proof is being abused in this hearing, because it is inappropriate; it

doesn't matter what the offer of proof is unless Counsel has first established that the alleged participant in this conversation was an agent or a supervisor.

JUDGE CONSTANTINE: But the point is he thinks he's established it, and he may convince the Board. If he does, then the Board will want to see what the evidence is as to whether they should refer it back to me, because if the evidence doesn't establish anything, even though they find agency, they won't send it back to me for further trial. So I'm going to allow the offer of proof.

MR. BOCKSTEIN: Very good. I would like to state I regard these offers of proof as prejudicial and improper.

JUDGE CONSTANTINE: Well, I once made a ruling that a man couldn't make an offer of proof under the same circumstances, where I thought -- I'm not asking Mr. Sheridan of this, and I want to make it clear, he's an honorable man and I think he's sincere -- but this other attorney for the General Counsel in another case out West, in my opinion, was just abusing his rights with an offer of proof; so I said, no more offers of proof except with permission of the Trial Examiner, I said, you're going too far afield. One of his offers of proof lasted for two hours and I thought that was overdoing it. The Board reversed me, they said offers of proof were a matter of law. I'm not going to argue with the Board.

MR. BOOKSTEIN: And I don't mean to argue with you, sir. I just felt I had an obligation to state my position for the record.

JUDGE CONSTANTINE: I know you're not arguing with me.

MR. SHERIDAN: The offer of proof is that if Mr. Scanlon were permitted to testify, he would testify that on November 9th Mr. Stevens called him and asked him what his status was. Mr. Scanlon said he was -- he's been ready to go back since he was laid off. Mr. Stevens said that Isadore Tabachneck would rather have him back than anyone. And Scanlon asked how come others had been hired back under him, and Stevens just replied, "You know." Then Stevens said he would set up a meeting with Sam Tabachneck for Sunday. Mr. Scanlon said he did not see any reason for a meeting, that they could just call him back. Mr. Stevens said that he could probably get Scanlon more money. Mr. Scanlon said he would let him know. That would be the end of that particular conversation.

JUDGE CONSTANTINE: All right, go to your next question.

MR. SHERIDAN: Yes. Mr. Scanlon would further testify -- this also refers to Mr. Stevens -- that --

JUDGE CONSTANTINE: This is another conversation?

MR. SHERIDAN: Yes, right.

JUDGE CONSTANTINE: On the same occasion or another date?

MR. SHERIDAN: Another date.

MR. BOOKSTEIN: What date?

JUDGE CONSTANTINE: Ask him that. My notes show November 9th. Let's have the record clear as to what it is.

MR. BOOKSTEIN: He's now going to talk about another date?

JUDGE CONSTANTINE: Yes.

MR. SHERIDAN: Yes.

MR. BOOKSTEIN: What date?

JUDGE CONSTANTINE: My notes don't show what date. All I know is that one conversation was between him and Stevens on November 9th. Why don't you go to your next question?

MR. SHERIDAN: All right.

Q (By Mr. Sheridan) Mr. Scanlon, I'll direct your attention to a date between November 12th and November 19th. Did you phone Mr. Stevens back?

A Yes, I did.

Q And did you have a conversation with him?

A Yes, sir.

Q And what was the conversation?

MR. BOOKSTEIN: The same objection, sir, and --

JUDGE CONSTANTINE: All right, okay, you don't have to argue it, I'll sustain the objection.

MR. BOOKSTEIN: Right. I would like, also, I think, to, in order to lay a basis for perhaps a further objection,

if I may ask Mr. Sheridan what paragraph of the Complaint this proposed offer of proof is referable to?

MR. SHERIDAN: Yes, I will.

JUDGE CONSTANTINE: You may ask him. I will not order him to answer it. It's up to him.

MR. SHERIDAN: Oh, I have no problem with answering that, your Honor.

MR. BOOKSTEIN: We get along very well.

JUDGE CONSTANTINE: Well, so far, all of us have been getting along pretty well. I see a couple of snickers -- maybe all of us except those that except the Trial Examiner.

MR. SHERIDAN: Yes, your Honor, that would be Paragraphs 6(l) and 6(m), insofar as they pertain to Mr. Stevens.

MR. BOOKSTEIN: Okay, thank you.

MR. SHERIDAN: You've already ruled on his objection?

JUDGE CONSTANTINE: Yes. You may make an offer of proof.

MR. SHERIDAN: Yes. The offer of proof is that if Mr. Scanlon were permitted to testify, he would testify that when he called Mr. Stevens back, he started the conversation out by saying he didn't see any reason for the meeting, and, again, that they could just call him back. Mr. Stevens said that a meeting would be to his benefit, and he could set up a meeting for Thursday. When Mr. Scanlon said that was Thanksgiving, Mr. Stevens said that he could set up a

meeting for Friday, at his house -- Mr. Stevens' house -- with Avrum Tabachneck; and that Mr. Stevens then told Mr. Scanlon there were some things that he could do, he could vote "no" or he could not show up to vote; and that a meeting was set up between Mr. Scanlon, at Mr. Stevens' house, with Mr. Avrum Tabachneck for 7:30 p.m., Friday, November 23rd, 1973.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: That's the end of the offer of proof.

JUDGE CONSTANTINE: Go ahead, sir.

Q (By Mr. Sheridan) Did you attend any such meeting, Mr. Scanlon?

A No, I didn't.

Q Okay. Were you ever called back?

A I never was.

Q Did you vote in the election?

A Did I vote -- yes, I did.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: I thought your next question was going to be, how did you vote?

MR. SHERIDAN: No.

(Laughter)

JUDGE CONSTANTINE: Everybody is smiling. There's a little humor in the room here today.

MR. BOOKSTEIN: Mr. Scanlon, did you give any signed

statement to a representative of the Board?

JUDGE CONSTANTINE: Well, you're entitled to that, but I can't imagine why you want it. I'm trying to expedite the hearing. What would you want it for, to contradict him?

MR. BOOKSTEIN: Well, I would know better after I saw it.

JUDGE CONSTANTINE: But this is not for discovery purposes -- I can't stop you from getting it but I don't think he's testified to anything that would hurt you. He said that there was a strike; he went out on strike; he didn't picket; and that he hasn't gone back to work.

MR. BOOKSTEIN: But there may be some things in his statement that haven't been testified to that would help me.

JUDGE CONSTANTINE: No, you're not entitled to it for discovery purposes, only to contradict his testimony, but I can't stop you from asking for it. Go ahead, give it to him, Mr. Sheridan.

MR. SHERIDAN: Yes, sir.

MR. BOOKSTEIN: I don't think the witness has said whether he even gave him one.

MR. SHERIDAN: Well, he did

MR. BOOKSTEIN: One or more than one.

MR. SHERIDAN: One statement. I'm turning over to Mr. Bookstein an affidavit of Mr. Scanlon consisting of approximately four pages.

JUDGE CONSTANTINE: Five minutes -- a five-minute recess.

MR. BOOKSTEIN: Thank you, sir.

JUDGE CONSTANTINE: Off the record for five minutes.

(A five-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Please proceed, Mr. Bookstein.

MR. BOOKSTEIN: I have no questions.

JUDGE CONSTANTINE: Okay. You may step down, Mr. Scanlon.

(The witness was excused.)

JUDGE CONSTANTINE: Do you want the record to show that you've returned that affidavit?

MR. BOOKSTEIN: I would appreciate it.

JUDGE CONSTANTINE: All right, the record may show that.

MR. SHERIDAN: The General Counsel calls John Quigley to the stand.

Whereupon,

JOHN QUIGLEY

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Will you please give your name and address for the record?

THE WITNESS: John Quigley, 133 Cardinal Avenue, Albany.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Quigley, did you ever work for Trading Port?

A Yes, I did.

Q And when did you first start working for them?

A March of 1970.

Q Did there come a time when your employment was terminated?

A I was laid off for approximately -- a year later for about four to five months.

Q And then were you rehired?

A Yes, I was.

Q And what was your job after you were rehired?

A I was order selector and I --

JUDGE CONSTANTINE: What kind of selector?

THE WITNESS: Order selector and forklift operator.

Q (By Mr. Sheridan) All right. I'll direct your attention to on or about August 29th, and ask you if you attended a Union meeting at the Local 294 Hall?

A I did attend a meeting. I'm not sure it was on that date.

Q Did you sign a Union card?

A Yes, I did.

Q And during the strike, did you picket?

A Yes, I did.

Q And how often did you picket?

A Fairly regularly. I missed -- well, I had a vacation during the period of the strike and I didn't picket at that time, but I -- fairly regularly, almost every day.

Q Now while you were on the picket line, at any time did Mr. Isadore Tabachneck come out to the picket line?

A Many.

Q How often?

A Almost once a day, with some exceptions.

Q Did he say anything?

A Quite a bit.

Q What did he say, that you can recall?

A He maintained a fairly good humor and spoke about the strike as being foolish and you're just hurting yourselves and you're hurting the business -- most often his comments were along that line.

Q Do you recall anything else that he said in these conversations?

A He did mention to me something about, "Well, the situation in the warehouse is such that we'd only be able to rehire a few individuals and you're one of the people I'd like to see rehired."

Q Do you recall anything else that he said?

A Not really.

Q Okay. Now I'll direct your attention to on or about

September the 28th. Did you picket that day?

A (No response.)

Q It would be the last day of the strike.

A Yeah -- I honestly don't remember if I did or not.

Q That evening, were you -- what, if anything, happened to you, the evening of the 28th?

A I was run over by a drunk driver.

Q And is that what has resulted in your condition presently?

A Yes.

Q Okay.

JUDGE CONSTANTINE: You don't contend the drunk driver was an agent?

MR. SHERIDAN: No, no, your Honor.

(Laughter)

JUDGE CONSTANTINE: Let the record show that everybody in the room laughed.

Q (By Mr. Sheridan) Did that result in any hospitalization by you?

A Yes.

Q For how long a period of time?

A From the 28th of September until the 4th of December.

Q Have you received any written notification from the Company in any change in your status?

A No.

Q Employees' status?

A No.

Q When you worked at the Company, did you have any hospitalization?

A Yes, I did.

Q What, if anything, happened to the hospitalization at the end of the strike?

A It was cancelled as per the letter that they sent around.

JUDGE CONSTANTINE: I think that is in evidence but why don't you have him identify it for purposes of the record, or did he give a different letter?

MR. SHERIDAN: No, no, it's -- yeah, I'll show it to him.

Q (By Mr. Sheridan) I'll show you, Mr. Quigley, what is in evidence as General Counsel's Exhibit 5 and ask you if that's the letter you just referred to in terms of hospitalization?

(Document shown to witness.)

THE WITNESS: Yes, it is.

Q (By Mr. Sheridan) The letter states that the hospitalization would be cancelled on September 29th. Do you know whether or not yours was cancelled on that date?

A No, I really don't know. I was in no condition to know anything at that time.

Q Did there ever come a time when you were notified that it was cancelled?

A No.

JUDGE CONSTANTINE: I'm confused now. He says he got a letter that it was cancelled, and that's GC-5, and now you say he --

MR. BOOKSTEIN: Well, GC-5 speaks for itself, Mr. Examiner.

JUDGE CONSTANTINE: I know.

MR. BOOKSTEIN: It speaks as of September 20, and it speaks prospectively.

JUDGE CONSTANTINE: All right. I understand that but--

MR. BOOKSTEIN: I didn't object to Counsel's question. I didn't think it was an accurate question but the exhibit is in evidence and it speaks for itself.

JUDGE CONSTANTINE: Can you stipulate that it was cancelled? If you want to contend that the letter is prospective and not self-executing, then I want some evidence as to whether it was cancelled or not.

MR. BOOKSTEIN: I don't have those records at hand to answer that question at the moment, your Honor.

JUDGE CONSTANTINE: Was it cancelled at some date, regardless of what the date is?

MR. BOOKSTEIN: For Mr. Quigley?

JUDGE CONSTANTINE: No, for all of them -- according to

GC-5.

MR. BOOKSTEIN: I have no recollection at the moment. I don't have the records with me. I'll have to develop that later on.

JUDGE CONSTANTINE: One of their contentions is that hospitalization was cancelled. I'd like to know if it was or not. I'll take evidence on it but I should think you could stipulate it.

MR. BOOKSTEIN: If I could have a moment to look at the Answer, I think maybe we did cover that.

MR. SHERIDAN: I believe it was covered by the Answer.

MR. BOOKSTEIN: I'm a little cold on it at the moment. If you'll give me a second, I'll be able to answer your question.

JUDGE CONSTANTINE: Sometimes you can't stipulate on a doubtful question but there's nothing in doubt here, either it was or was not cancelled.

MR. SHERIDAN: Your Honor, I believe the Company has admitted that it cancelled hospitalization for certain of the employees, including Mr. Quigley.

JUDGE CONSTANTINE: Is his name mentioned in the --

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: Oh, all right.

MR. BOOKSTEIN: It is expressly mentioned in Paragraph 12 of the Answer.

JUDGE CONSTANTINE: Well, I don't have the benefit of the Answer.

MR. BOOKSTEIN: Yes. I did not recall as I sat here, that's why I wanted to refer to it.

JUDGE CONSTANTINE: All right, that takes care of it. Then his statement that his hospitalization was cancelled is accurate?

MR. BOOKSTEIN: That's correct.

Q (By Mr. Sheridan) Now as a result of that cancellation, did you incur any additional expenses, Mr. Quigley?

MR. BOOKSTEIN: I object to this as immaterial and irrelevant.

JUDGE CONSTANTINE: I think it is.

MR. SHERIDAN: Well, your Honor, the reason --

JUDGE CONSTANTINE: If he's entitled to hospitalization, that's it. If there's a breach of contract, that's not for me, it's for him to sue the company or the insurance company.

MR. SHERIDAN: Of course we're alleging the action of the Company in cancelling as an unfair labor practice.

JUDGE CONSTANTINE: I'm allowing you to prove that, but the damage it cost him is not an issue in the case. I regret to make such a ruling because I'm sorry for the man. He comes here almost a cripple with crutches. The record may show that, but still I have to decide these cases on the law and not on sympathy.

Q (By Mr. Sheridan) Now did there ever come a time when you were notified in any way by the Company that you were no longer considered an employee?

A Not by the Company. The only time that I --

MR. BOOKSTEIN: Well, I object to --

JUDGE CONSTANTINE: I'll take it subject to a motion to strike. It may be useful, it may be not. He says he's been notified that he's not an employee.

MR. BOOKSTEIN: I felt the question was answered and that there was another question that should be asked.

JUDGE CONSTANTINE: All right, then, the answer to that question is that the Company did notify him. Did anyone else notify you?

THE WITNESS: No, I said not by the Company.

Q (By Mr. Sheridan) Did you appear at the December 4th election?

A Yes, I did.

Q Did you attempt to vote?

A Yes, I did.

Q What, if anything, happened to your vote?

A It was challenged because --

Q By which party?

A By the Company -- by the Respondent, that I was no longer an employee.

Q Was that the first indication you had that they so

considered you?

A Yes.

MR. BOOKSTEIN: I would like -- the answer got in before I could state a position, but I think the fact that Mr. Quigley's vote was challenged is neither material nor relevant in any of the issues in this case.

JUDGE CONSTANTINE: Yes, it is, because I want to know if he's been discharged. I can't reinstate him if he's still an employee. They want reinstatement. I'm entitled to know if he's been discharged, that is some evidence that the Company considers him no longer an employee from which I can draw the inference, not that I will but I may draw the inference that he was discharged.

MR. BOOKSTEIN: Concededly, it is susceptible of varying inferences.

JUDGE CONSTANTINE: All right. I'll overrule your objection unless you withdraw it.

MR. BOOKSTEIN: I withdraw it.

JUDGE CONSTANTINE: All right, then, I won't have to overrule it.

MR. BOOKSTEIN: And I won't have to suffer a defeat.

JUDGE CONSTANTINE: What do you mean defeat? I haven't decided the case yet.

MR. BOOKSTEIN: Well, an unfavorable ruling.

JUDGE CONSTANTINE: All right.

MR. SHERIDAN: I have nothing further, your Honor.

JUDGE CONSTANTINE: All right. To make this short, let him have any statement that you have from the witness.

MR. SHERIDAN: Yes, sir. Your Honor, we have one affidavit from Mr. Quigley, and let the record show I am turning that affidavit over to Mr. Bookstein.

JUDGE CONSTANTINE: How long is this so I'll know how long to recess?

MR. SHERIDAN: 2½ pages.

JUDGE CONSTANTINE: 2½ pages?

MR. SHERIDAN: Yes.

JUDGE CONSTANTINE: A five-minute recess. Off the record.

(A five-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Please proceed with your cross-examination, Mr. Bookstein.

CROSS-EXAMINATION

Q (By Mr. Bookstein) Mr. Quigley, you testified on direct examination that at the times you had contact with Isadore Tabachneck on the picket line, he was in a fairly good humor, is that correct?

A Yes, sir.

Q Is it fair to say he didn't seem to be upset on those occasions when you saw him?

A He was upset about the situation but his humor was -- he wasn't belligerent to any great extent.

Q He seemed to take the situation in stride, did he?

A Such was his appearance.

Q All right. And, in fact, didn't Mr. Isadore Tabachneck on a couple occasions visit you while you were hospitalized?

A Yes, he did.

Q And isn't it a fact, also, that on those occasions when he visited he made no mention of your not being employed at Trading Port?

A Made no mention of Trading Port whatsoever.

Q And made no mention about your status at Trading Port, right?

A No mention of the warehouse.

Q All right. Did you attend the meeting at which Sam Tabachneck addressed the employees?

A Yes.

JUDGE CONSTANTINE: That's going beyond the direct.

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: I exclude it on my own even though there is no objection, because I go by the rule that you're limited by the direct of the General Counsel.

MR. BOOKSTEIN: Even if I elect to make the witness my own on this matter?

JUDGE CONSTANTINE: You can do that, but in a long case

like this, I'd rather have you do it when you put on your case. It makes it easier on me when I come to read the record.

MR. BOOKSTEIN: Well, I'd be happy to do it but out of deference to Mr. Quigley's physical condition, I --

MR. SHERIDAN: I have no objection, your Honor, if he wants to make him his own witness on this.

JUDGE CONSTANTINE: Well, finish your cross-examination and then make him your witness.

MR. BOOKSTEIN: Okay.

JUDGE CONSTANTINE: I want to know just when he is your witness.

Q (By Mr. Bookstein) You testified on direct, Mr. Quigley, that you were hospitalized from September 28 to December 4 -- or September 29, was it?

A Admitted to the Emergency Room at about 11:55 on the 28th of September.

Q Right. And you were in the hospital until December 4?

A I believe it was the 4th -- 3rd or 4th.

Q What hospital was that?

A Albany Medical Center.

Q And when you were discharged from the Medical Center, you were discharged by wheelchair, were you not?

A Yes, I was.

Q And, as the Trial Examiner noted, you're here today

with crutches.

A That's correct.

Q May I ask approximately when you were able to graduate from using a wheelchair to using crutches?

A I was using crutches while in the hospital. The discharge policy of the hospital was that you are discharged by wheelchair.

Q Right. And when you appeared to vote on December 4, you appeared in a wheelchair, did you not?

A That's correct.

Q Do you still use the wheelchair?

A No, I do not.

Q When did you stop using it, approximately?

A In January at some time or other.

Q And may I ask who is your attending physician?

A Doctor Carl Wirth.

Q And has there been an orthopedist in on the case?

A He is.

Q He is an orthopedist. And what was your injury?

JUDGE CONSTANTINE: Well, I think you're going too far. This has to do with compliance. If I do order him to come back, then the question is, when is he able to come back and how much back pay, if any, is he entitled to, but that's not an issue in this case.

MR. BOOKSTEIN: I am not going to that issue. If I may

say so, I'm trying to develop this because I will demonstrate it had to do with the Company's handling of Mr. Quigley.

JUDGE CONSTANTINE: Well, that has to do with compliance, if I find that he's entitled to reinstatement. At the compliance stage, you can show that there should be no back pay but that's not an issue here.

MR. BOOKSTEIN: I understand that and I'm not offering it in that respect. I merely wish to make myself clear and then I'll accept whatever the ruling is. I'm not sure --

JUDGE CONSTANTINE: Well, my ruling is that I will not go into questions of compliance at this stage of the procedure.

MR. BOOKSTEIN: Yes. I'm not sure I've made myself clear to you yet. It's for the purpose of my -- this line of testimony, but it has to do with the absence of communication to Mr. Quigley.

JUDGE CONSTANTINE: I still don't see it. You may make an offer of proof. Go ahead. I don't see how his physical condition has anything to do with the issues before me. I may be wrong but that's the way I look at it. I can see where they're material if I find a violation.

MR. BOOKSTEIN: It certainly had to do -- it's our position it had to do with our appraisal of when, as a practical matter, Mr. Quigley would be available in any event to return to employment.

JUDGE CONSTANTINE: Correct. That's a compliance question.

MR. BOOKSTEIN: Well, it is, I think, more than just a compliance question.

JUDGE CONSTANTINE: All right, I'll adhere to my ruling.

MR. BOOKSTEIN: I assume the ruling would be the same if I ask Mr. Quigley what prognosis, if any, he's been given by his orthopedist as to when he can return to work?

JUDGE CONSTANTINE: Yes.

MR. BOOKSTEIN: All right, then, I will not ask that question.

JUDGE CONSTANTINE: I want to make it clear that it will become material if I find a violation, but I don't think it's material at this stage in the proceeding; that's why I'm excluding the question as to his physical condition.

MR. BOOKSTEIN: I disagree with and abide by your ruling.

JUDGE CONSTANTINE: All right. There will be two questions at the compliance stage; one is, his ability to return to work, and, second, whether he should receive back pay during the period when he was admittedly unable to work. Those aren't issues before me.

MR. BOOKSTEIN: I would then like, if I may, sir, to turn to an area that was not covered on Mr. Sheridan's direct and --

JUDGE CONSTANTINE: You have finished your cross-exam-

ination?

MR. BOOKSTEIN: Yes, sir.

JUDGE CONSTANTINE: You may go -- I don't want to make a practice of this. As I said, in long cases I prefer that the General Counsel rest before you put on your case, but from now on he's your witness.

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: And I ask to do this solely because of his --

JUDGE CONSTANTINE: Of his condition, I understand.

MR. BOOKSTEIN: I don't want to bother him to come back.

JUDGE CONSTANTINE: I understand that. All right, go ahead. I just want the record to be clear, so that from this point on Mr. Sheridan has the right to cross examine your witness.

MR. BOOKSTEIN: Right.

DIRECT EXAMINATION

Q (By Mr. Bookstein) Did you attend a meeting at the warehouse at which Sam Tabachneck spoke to employees?

A Yes, I did.

Q Would you tell the Trial Examiner, in words or substance, what Mr. Sam Tabachneck said on that occasion?

A He said approximately -- you know, "Don't strike. A strike would be foolish. It would hurt both the Company and

the employees." If this is the same statement that I remember him making, he also made a statement as far as the Union election went, that he would abide by the results of the election, whichever way they went.

Q Do you recall anything further, or is that about it?

A That's approximately it.

MR. BOOKSTEIN: No further questions.

JUDGE CONSTANTINE: Is there any cross-examination?

MR. SHERIDAN: Yes, very short.

JUDGE CONSTANTINE: Well, I really was a little too fast. I should have said, is there any redirect before --

MR. SHERIDAN: There's no redirect, your Honor.

JUDGE CONSTANTINE: All right. Now the question is, is there any cross-examination?

MR. SHERIDAN: Yes.

CROSS-EXAMINATION

Q (By Mr. Sheridan) Mr. Quigley, did Sam Tabachneck have the office clericals with him when he spoke this time?

A No, I don't believe he did.

Q When was this meeting that you're referring to?

A Well, some time before the election.

JUDGE CONSTANTINE: Was it before the strike?

THE WITNESS: Yes.

JUDGE CONSTANTINE: All right, that helps.

Q (By Mr. Sheridan) And who was at this meeting?

A The warehouse employees -- when we returned from lunch, I believe, somewhere around that time.

Q And do you recall anyone else was there from the Company besides Sam Tabachneck?

A Not specifically, although there may have been -- Isadore or someone else may have been but I can't recall.

Q You don't recall if there were any office clericals at this meeting that you testified about?

A No, I don't.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: Any redirect on the cross?

MR. BOOKSTEIN: No, sir.

JUDGE CONSTANTINE: All right. You may leave the stand, Mr. Quigley.

(The witness was excused.)

MR. BOOKSTEIN: Let the record show that I am returning Mr. Quigley's statement to Mr. Sheridan.

JUDGE CONSTANTINE: All right, the record may show that.

MR. SHERIDAN: General Counsel calls William Savage to the stand.

Whereupon,

WILLIAM SAVAGE

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please give your name and address for the record.

THE WITNESS: William Savage, 104 Braintree Street, Albany, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Savage, did you ever work for Trading Port, Inc.?

A Yes, I did.

Q How long did you work there?

A Approximately a year and two months.

Q And what was your job?

A Tractor-trailer driver.

JUDGE CONSTANTINE: I didn't hear you.

THE WITNESS: Tractor-trailer driver.

JUDGE CONSTANTINE: Thank you.

Q (By Mr. Sheridan) Did you sign a Union card?

A Yes, I did.

Q Did you go out on strike when the other employees did?

A Yes, I did.

Q Did you picket at all?

A Yeah.

Q And how often did you picket?

A About, I'd say, 17 or 18 out of all the days we were out there.

Q And during the time that you were picketing, did you ever

see Mr. Isadore Tabachneck at the picket line?

A Yes, sir, I did.

Q And how often did you see him there?

A Twice.

Q And what times did you picket?

A The first week I picketed from 8:00 in the morning to noon, and after that I picketed mostly from 8:00 at night to midnight.

Q And when was the period of time when you saw Mr. Tabachneck?

A I saw him once about 12:00 o'clock, 12:30, and the other time was about 9:30 at night.

MR. BOOKSTEIN: Talking night or day?

THE WITNESS: 12:00 noon.

Q (By Mr. Sheridan) And the second time was at what time?

A About 9:30 at night.

Q At night. Okay. The first time he was there, did he say anything?

A Yes, he did.

Q What did he say?

A He said he would like to thank all us men who were on the picket line for helping him make up his mind about whether he was going to buy a condominium in Florida.

Q Now the second time that he spoke, do you recall what

he said -- this second time, did he speak to you directly?

A Yes, he did.

Q What did he say?

A He asked me why I was out on strike, and I told him that I thought we should have better wages and better benefits, and he said, well, if that was the case, why didn't I look for another job, and I told him that I was looking for another job, and he said, that's good because I probably wouldn't have mine if we went back.

MR. SHERIDAN: Would you mark this for identification, please, as -- mark these for identification as General Counsel's Exhibits 12(a) and 12(b).

(The document above-referred to was marked General Counsel's Exhibit Nos. 12(a) and 12(b) for identification.)

Q (By Mr. Sheridan) I'll show you, Mr. Savage, what's been marked for identification as General Counsel's Exhibit 12(a) and ask if you have ever seen that card before?

(Document handed to witness.)

THE WITNESS: Yes, I did.

Q (By Mr. Sheridan) Directing your attention to the date that appears on there -- the card, is that the date that you first saw it, 8/31?

A I would have to know what day of the week that was.

Q Well, what day of the week -- who gave the card to Mr. Frank?

A I did.

Q And what day of the week was it that you gave it to him?

A It was -- I'm pretty sure --

MR. BOOKSTEIN: We raise no issue about the authenticity of that card.

JUDGE CONSTANTINE: All right, no argument on that.

Q (By Mr. Sheridan) And I'll show you General Counsel's Exhibit 12 -- did you see Mr. Frank sign the card?

A Yes, I did.

Q And General Counsel's 12(b), did you give the card to that individual?

(Document shown to witness.)

THE WITNESS: Yes, I did.

Q (By Mr. Sheridan) And did you see him sign it and fill it out?

A Yes, I did.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibit 12(a) and 12(b).

JUDGE CONSTANTINE: Who are the employees -- Frank --

MR. SHERIDAN: Frank is 12(a) and Garhartt is 12(b).

JUDGE CONSTANTINE: Thank you.

MR. BOOKSTEIN: May I have just one moment, please?

(Pause)

MR. BOOKSTEIN: May I ask a preliminary question on the

offer?

JUDGE CONSTANTINE: On voir dire.

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: It has to be proper voir dire rather than preliminary examination.

MR. BOOKSTEIN: Yes.

MR. SHERIDAN: Your Honor, he's already stated he has no objection to the cards, so --

JUDGE CONSTANTINE: Only one he said, on Frank's.

MR. SHERIDAN: Oh.

JUDGE CONSTANTINE: You said you didn't place any validity of Frank's card.

MR. BOOKSTEIN: Well, if I said that, I misquote myself. I meant I had none on Garhartt.

JUDGE CONSTANTINE: All right, then, you may ask that voir dire on Frank.

MR. SHERIDAN: Well, then, your Honor, I would request to ask the questions that I was trying to ask when he said he had no objection.

MR. BOOKSTEIN: I have no objection of his going ahead.

JUDGE CONSTANTINE: All right, go ahead. Only on Frank's card. Garhartt, there's no objection to it.

Q (By Mr. Sheridan) Now, Mr. Savage, when you gave the card -- that's General Counsel's Exhibit 12(a) -- to Mr. Frank, what, if anything, did you say to him? What was the

conversation between the two of you?

A Well, I told him —

MR. BOOKSTEIN: I have no objection to the conversation, but I think the foundation, we are entitled to know who, if anyone, was present when this conversation took place.

Q (By Mr. Sheridan) Was anyone else present?

A Tommy Garhartt was present, and I'm pretty sure that Wayne Smith was present.

Q Now would you relate the conversation, please?

A I asked Joe if he would like to sign the Union card, and he said, "How many other people have signed it," and I said, according to my knowledge, about 33, so he said, "Okay, I'll sign it," and he signed the card.

JUDGE CONSTANTINE: He offers them; do you object?

MR. BOOKSTEIN: I have no objection.

JUDGE CONSTANTINE: All right, in the absence of objection, 12(a) and 12(b) of the General Counsel's exhibits will be received.

(The documents, heretofore marked General Counsel's Exhibit Nos. 12(a) and 12(b), were received in evidence.)

Q (By Mr. Sheridan) Were you ever recalled, Mr. Savage?

JUDGE CONSTANTINE: Was he ever what?

THE WITNESS: No, I was not.

JUDGE CONSTANTINE: I didn't hear the question.

MR. SHERIDAN: Recalled to work.

JUDGE CONSTANTINE: All right. Let's put it this way, to save you on the future ones, I will assume none of your witnesses have been recalled unless you specifically ask them and they answer "yes."

MR. SHERIDAN: Right.

JUDGE CONSTANTINE: I'll just assume that's so. I'm trying to cut down the length of the hearing. All right, give the statement of this witness, if you have one, to Mr. Bookstein.

MR. SHERIDAN: I have no statement, your Honor.

JUDGE CONSTANTINE: All right. You're not bound by that. You may ask the witness if he gave one. That's up to you, Mr. Bookstein.

MR. BOOKSTEIN: Mr. Sheridan's unsworn word is good enough for me, Mr. Examiner.

JUDGE CONSTANTINE: It is for me, too, but I want to say that you're entitled to ask the witness. I want the record to be clear on that. Somebody in Washington might say I'm cutting off your rights -- I don't intend to -- you have that right to ask.

MR. BOOKSTEIN: Thank you, sir. I appreciate it.

CROSS-EXAMINATION

Q (By Mr. Bookstein) In the conversation you related, Mr. Savage, with Isadore Tabachneck, around noon, involving the

condominium, isn't it a fact that Mr. Tabachneck also told you then, in words or substance, that he had been contemplating retirement for himself?

A Yes.

Q And it was in that setting that he mentioned the condominium; isn't that so?

A He mentioned the condominium in the setting that we had made up his mind for him.

Q To retire?

A Right.

Q Okay.

MR. BOOKSTEIN: No further questions.

JUDGE CONSTANTINE: Any rebuttal -- I mean redirect?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: You may step down, Mr. Witness.

(The witness was excused.)

JUDGE CONSTANTINE: Let's have a morning recess, unless you want to keep proceeding. I'll leave it to you and the Court Reporter.

MR. BOOKSTEIN: I would appreciate an opportunity to make a phone call to my office.

JUDGE CONSTANTINE: All right. How long do you want?

MR. BOOKSTEIN: Ten minutes.

JUDGE CONSTANTINE: A ten-minute recess. Off the record.

(A ten-minute recess was taken.)

JUDGE CONSTANTINE: On the record. I have declared the recess ended.

Please proceed, Mr. Sheridan.

MR. SHERIDAN: Yes, your Honor. General Counsel calls John Cafaro to the stand.

Whereupon,

JOHN CAFARO

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Won't you be good enough to give your name and address for the record?

THE WITNESS: It's John Dennis Cafaro, 3 Chesbrough Drive, Schenectady, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Cafaro, did you ever work for Trading Port, Inc.?

A Yes, I did, sir.

Q About how long?

A About two-and-a-half years.

Q Were you a part-time employee?

A Yes, I was.

Q About how many hours a week did you work?

A When I left, I was down to about nine hours.

Q Do you have another job?

A Yes, I do

Q And where are you employed?

A City Bank Eastern.

MR. SHERIDAN: Would you mark this for identification, please, as General Counsel's Exhibit 13.

(The document above-referred to was marked General Counsel's Exhibit No. 13 for identification.)

Q (By Mr. Sheridan) All right, Mr. Cafaro, I'll show you what's been marked for identification as General Counsel's Exhibit 13 and ask if you've seen that before?

(Document shown to witness.)

THE WITNESS: Yes, I have.

Q (By Mr. Sheridan) Did you fill that out yourself and sign it?

A Yes, I did.

MR. SHERIDAN: I offer in evidence General Counsel's Exhibit 13.

MR. BOOKSTEIN: No objection.

JUDGE CONSTANTINE: All right, in the absence of objection, it may be received.

(The document, heretofore marked General Counsel's Exhibit No. 13, was received in evidence.)

Q (By Mr. Sheridan) Did you go out on strike with the other employees?

A Yes, I did.

Q And did you picket?

A Yes, I did.

Q Now I'll direct your attention to on or about November 1. Did you call the Trading Port that day?

A Yes, I did.

Q And who did you speak with?

A At this particular time, I'm not sure — it was either Avrum or it was Izzy, either one.

Q Tabachneck?

A Right.

Q And what was the conversation?

A I was more or less calling him up and asking him if anything was changed; if possibly I might get my job back as part-time. He said, "At this particular time I'm unsure. I'm going to wait until the election is complete before I make, you know, a final status of my employees."

Q Okay. By the way, did you have hospitalization when you were there, Mr. Cafaro?

A No, I did not.

Q Have you ever been recalled?

A No.

MR. SHERIDAN: Nothing further, your Honor.

JUDGE CONSTANTINE: All right.

MR. BOOKSTEIN: Mr. Cafaro, have you given any signed

statement to the Board?

THE WITNESS: No, I have not.

MR. BOOKSTEIN: Okay.

CROSS-EXAMINATION

Q (By Mr. Bookstein) I ask you whether -- if you will please search your recollection as to whether it wasn't October 1, rather than November 1, when you had the telephone conversation that you related on direct examination?

A I did have one, I believe, on October 1st. That is my first conversation with management, and I did have a second call around November 1st.

Q And I ask you if in that call on October 1 it wasn't Isadore Tabachneck that you spoke to?

JUDGE CONSTANTINE: He didn't testify to any on October 1.

MR. BOOKSTEIN: He just did.

JUDGE CONSTANTINE: Well, that's cross-examination. You're limited to the direct. The direct is that he only spoke on November 1st; that's what my notes show.

MR. BOOKSTEIN: Well, the witness, I think on direct, testified he wasn't sure on the November 1 call, whether he spoke with Avrum or Isadore, and I'm trying to see if I can get into that.

JUDGE CONSTANTINE: You can get into that but you can't go -- he admits he had made two calls. You're only entitled

to examine on one.

MR. BOOKSTEIN: I understand that, but if I can establish with Mr. Cafaro the identity of the person he spoke with on October 1, then perhaps it will help him in remembering who he spoke to on November 1.

JUDGE CONSTANTINE: Maybe so but I'm going to exclude you from any talk on the October 1st one, unless you make him your witness.

MR. BOOKSTEIN: I'm not going to the substance of the conversation at the moment; if I do, I understand that he will be my witness.

JUDGE CONSTANTINE: Well, go ahead, go to the next question, let's see what happens.

Q (By Mr. Bookstein) Do you recall whether the November 1 conversation was with Avrum or Isadore? If you don't, that's all right --

A I really do not remember. I'd rather not say.

Q All right.

JUDGE CONSTANTINE: Would you know who you talked to on October 1st, without giving the conversation?

THE WITNESS: Isadore.

JUDGE CONSTANTINE: Does that help you?

MR. BOOKSTEIN: That was on October 1?

JUDGE CONSTANTINE: Yes, he said it was Isadore.

MR. BOOKSTEIN: Yes, it does.

JUDGE CONSTANTINE: He says he doesn't know who it was on November 1.

MR. BOOKSTEIN: That's okay.

Q (By Mr. Bookstein) And on the -- in the call on November 1, whoever you spoke to, Mr. Cafaro, were you told, in substance, that at Trading Port they didn't know what was going on yet and that everything was up in the air?

A That is correct.

Q And that they weren't in the position to promise anything?

A That's correct.

Q Now, Mr. Sheridan brought out that you were a part-time employee at the Trading Port?

A That's correct.

Q Isn't it also a fact that your part-time employment was put in nights and Saturdays?

A That's correct.

Q Now you worked for Trading Port, you said, for two-and-a-half years; is that right?

A Well, let's see. I started in November of 1970 up through the strike.

Q Right.

A So maybe close to three.

Q And you told Mr. Sheridan that -- I think that you struck and did some picketing, correct?

A That's correct.

Q Prior to your employment with Trading Port, had you been a member of Teamsters Local 294?

A Yes, I have.

MR. BOCKSTEIN: No further questions.

JUDGE CONSTANTINE: Any redirect?

MR. SHERIDAN: Nothing, your Honor.

JUDGE CONSTANTINE: You may step down, Mr. Witness.

(The witness was excused.)

MR. SHERIDAN: General Counsel calls Frank Houck, Jr. to the stand.

Whereupon,

FRANK HOUCK, JR.

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Let's have your name and address for the record.

THE WITNESS: Frank Houck, Jr., 120 Vly Road, Albany, 5, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Houck, did you ever work for Trading Port, Inc.?

A Yes.

Q And are you presently employed by Trading Port?

A Yes, I am.

Q And how long have you worked for the Company?

A 12 years.

Q Now I'll direct your attention to on or about August 29th; did you attend a meeting at the Union Hall?

A Yes, I did.

Q And did you sign a card at the meeting?

A Yes, I did.

Q Were you one of the individuals who went out on strike?

A Yes, I was.

Q Did you do any picketing?

A Yes, sir.

Q How often?

A Every day.

Q Now it's been stipulated that you -- it may not have been stipulated. On or about October 1st, did you go to the Company?

A Yes, I did.

Q And this was after the strike?

A Yes.

Q And what, if anything, happened when you went there that day?

A I got laid off.

Q How did this come about? What happened? Who did you talk to and what was said?

A I got the slip from Avrum Tabachneck.

JUDGE CONSTANTINE: I'm sorry, I couldn't hear that last part.

THE WITNESS: I said I got my layoff slip from Avrum Tabachneck.

Q (By Mr. Sheridan) All right, I'll direct your attention to on or about October 9th, 1973, did you receive a phone call from Mr. Avrum Tabachneck?

A Yes, I did.

Q And what was the call? What did he say to you and what did you say to him, if anything?

A He said he wanted to see me so we could talk. I said, "If it's for work, I'll come down," and then I was called in for work.

Q Did you go to work the next day?

A Yes, I did, that was the 10th.

Q At what time?

A 7:00 o'clock in the morning.

Q And what happened when you went to work?

A Well, I punched in and then I went down and had a talk in the conference room with Avrum.

Q And how did you happen to talk to him?

A He just asked me, you know, what my feelings towards the -- about --

Q No, I mean how did you happen to go in there?

A Pardon?

Q How did you happen to go into his office?

A I was called down.

Q By Avrum Tabachneck?

A Yes.

Q Did you have a conversation with him?

A Yes, I did.

Q And what was the conversation?

MR. BOOKSTEIN: May I inquire of General Counsel whether this is referable to any 8(a)(1) clause of the Complaint?

MR. SHERIDAN: Yes, the Complaint does allege what we're going to elicit happened on that day -- on or about that day.

MR. BOOKSTEIN: If I may have just a moment -- I don't find any such date. I don't want to object needlessly -- perhaps you can help me.

MR. SHERIDAN: It's the amendment -- Paragraph 1 of the amendment of 15 February, 1974.

MR. BOOKSTEIN: Yes, which paragraph?

MR. SHERIDAN: The first paragraph of the amendment.

MR. BOOKSTEIN: I see 1, 2, 3, 4, 5 specific date, but I do not see any October 10 there.

MR. SHERIDAN: Well, it says on or about October 8th.

MR. BOOKSTEIN: It does not, sir.

JUDGE CONSTANTINE: Someone show it to me, please. I

don't have a copy of it.

(Document shown to Judge Constantine.)

JUDGE CONSTANTINE: I'm going to rule he's not going to be held exactly to these dates, but he may go a few days before or after, but you can't go much more than that.

MR. SHERIDAN: Yes, your Honor.

JUDGE CONSTANTINE: Now, October 10th and October 8th is so close that I'm going to rule it's okay. He has some latitude there. I want to make it clear that you have very little latitude. A week, in my opinion, would be too much; two days, I think, is all right.

You get an automatic exception, Mr. Bookstein.

MR. BOOKSTEIN: I understand that, sir.

Q (By Mr. Sheridan) All right, what was your conversation with Mr. Tabachneck?

A Well, it was more or less about why I got involved with the Union.

Q Relate it as the conversation developed.

MR. BOOKSTEIN: I object to that statement by the witness and move to strike it. I think he should stick to the words insofar as he's able to, and insofar as he can't, the substance, but we ought to be sure --

JUDGE CONSTANTINE: "More or less" doesn't mean anything. I sustain your objection.

Q (By Mr. Sheridan) Just testify in words that -- as near

as you can recall, the exact words that were said in this conversation -- how it started and how the conversation progressed?

JUDGE CONSTANTINE: Well, we know how it started. He was called into the office.

Q (By Mr. Sheridan) I mean the words. You were called into the office; who was the first one that spoke?

A It was just myself and Avrum.

Q Which one of the two of you was the first one that spoke, as you recall?

A Geez, I don't recall offhand. I think he was the first to start, you know -- but word for word, the whole --

Q Well, as near as you can recall what he said.

A Like I said, he asked me my feelings, why I was involved with it.

Q Involved with what?

JUDGE CONSTANTINE: Wait a minute, one thing at a time. He asked you your feelings, why you were involved in what?

THE WITNESS: With the Union movement. Why I got into it. Why I -- you know, was for the Union.

Q (By Mr. Sheridan) And did you answer him?

A Yes, I did.

Q What did you say?

A Well, I told him, I says, the benefits, and I told him how we had sick leave and it was taken away from us, and

things like that, you know, pushed me towards the Union.

Q Do you recall anything else that he said?

A He said, "The way things look now, with the men outside and what men were inside," he says, "it looks like I'll be taking on a silent partner."

Q And did you respond to that?

A No.

Q Did you start work that day?

A Yes, I did.

Q And have you worked ever since?

A Yes, I have.

Q Prior to the strike, what was your job?

A I was a forklift operator.

Q And what job were you hired back as?

A Right now I'm on the freight cars, unloading freight cars.

Q Is there any change in the rate of pay?

A No, there isn't.

JUDGE CONSTANTINE: Well, let me ask him a question, subject to objection by everybody but I'm going to ask him anyway.

Do you claim you're any worse off now than you were before, as far as job is concerned, not pay? Is there much difference in the job?

THE WITNESS: No.

JUDGE CONSTANTINE: All right. I just wondered whether I should, if I found a violation, should make some kind of an order to get his forklift job back. I'm not going to. Assuming that I find a violation, I will not find that he's been discriminated against on being rehired. I have to go by his own statement.

Q (By Mr. Sheridan) Do you know a Walter Snyder?

A Yes, I do.

Q And to your knowledge, what does he do?

A Well, Walter is more or less in charge of the office.

Q Which office is this?

MR. BOOKSTEIN: I object to that and move to strike it.

JUDGE CONSTANTINE: That "more or less," all right, I'll strike --

MR. BOOKSTEIN: Not only the "more or less," the entire answer.

JUDGE CONSTANTINE: "Mor or less in charge of the office."

MR. BOOKSTEIN: Yes.

JUDGE CONSTANTINE: I sustain the objection and strike the answer.

Q (By Mr. Sheridan) Have you, personally, seen Mr. Snyder at the place?

A Yes, I have.

Q Where does he work?

A In the office, the whole office itself. He takes care of the computers and sets up the programs, and things along those lines.

Q Have you seen him do this?

A Yes, I have.

Q What, if anything, else have you seen him do?

JUDGE CONSTANTINE: Besides going to the fountain to drink water.

Q (By Mr. Sheridan) Is there one office or more than one office at the warehouse?

A There's two offices, an upstairs and a downstairs office.

Q Where is he located?

A In the upstairs office.

Q And who else is in the upstairs office, if anybody is?

A There's a couple girls that take the orders on the phones.

Q I mean in the office that he works. Is that in the office where he works?

A Upstairs, yes.

Q How many hours a week did you work before the strike?

A 45.

Q And how many hours do you work now?

A 45.

Q Do you know whether or not there's been any change in

the work schedule of any of the other employees?

A Usually Tuesdays, there's a volunteer. If you want to come in to work at 6:00 o'clock instead of starting at 7:00, you know, it's a volunteer basis.

Q Do you know whether or not any employees do come in that early?

A I know employees come in but I don't know who.

Q Prior to the strike, did anyone come in to work that early?

A Before the strike, yeah, we had a crew, 6:00 to 3:30.

Q You had one crew?

A There was guys that started at 6:00 to 3:30. As a matter of fact, them are the hours that I worked before the strike, 6:00 to 3:30.

Q But the ones who come in early now, when do they work to -- what time?

A 4:30.

JUDGE CONSTANTINE: The regular quitting time?

THE WITNESS: Right.

JUDGE CONSTANTINE: In other words, they can have an extra hour if they want?

THE WITNESS: Right, it's all voluntary.

Q (By Mr. Sheridan) Now since the strike ended, have you seen any truck drivers coming into the warehouse?

A You mean for pickups and stuff like that, customer

pickups?

Q Yes.

A Yes, all the customers do their own picking up.

Q Have you seen any -- do you know an individual by the name of Charlie Higgs?

A Yes, I do.

Q Prior to the strike, did he ever work for the Company?

A No, he never worked for the Company.

Q After the strike began, did you see Mr. Higgs at Trading Port?

A Yes.

Q And what did he do?

A He was pulling loads out with his tractor-trailer.

Q Do you know whether or not he was actually employed by the Trading Port?

A No, I don't know.

Q All right, I'll direct your attention to on or about November 30th, 1973, prior to the election. Were you in the Orchard Tavern that day?

A It was a Friday -- yes, I was.

Q Was anyone else in with you?

A There was Mr. Bishop; there was Jim Dillenbeck; Ira Stockwell; and then Avrum come over with Luke Brunelle; Isadore Tabachneck; and one of the people from G.E.X., I don't know his name.

Q Do you recall whether or not there was anyone else -- any other employees there, or former employees?

A I think a couple of people that were in the warehouse came over for their lunch, but, you know, names I don't remember but there were a few from the warehouse over there.

Q Do you remember whether or not Mr. Ballou was in there?

A Yes, he was.

Q Now, what time did you come in?

A About five minutes to 12:00.

MR. BOOKSTEIN: I'm sorry, I couldn't hear.

JUDGE CONSTANTINE: Five minutes to 12:00.

Q (By Mr. Sheridan) Did there come a time when you left?

A Yes.

Q About what time?

A 12:30.

Q Were you in there to eat your lunch?

A Yes.

Q And did you return after 12:30?

A Yes.

Q While you were in there, did you hear Mr. Isadore Tabachneck say anything?

A No.

Q When you left, was there anybody else there, any of the employees who were with you still there?

A Mr. Bishop remained because he had the afternoon off

for personal business.

Q And how about Mr. Dillenbeck?

A Yes, he was still there; Ira; Charlie Ballou, they were there when I left.

MR. SHERIDAN: Nothing further, your Honor.

MR. BOOKSTEIN: Mr. Houck, did you furnish any representative of the Board with any signed statement?

THE WITNESS: Yes, I did.

MR. BOOKSTEIN: One or more than one?

THE WITNESS: One.

MR. BOOKSTEIN: At this time I would move for the production --

JUDGE CONSTANTINE: Motion granted. How long is that?

MR. SHERIDAN: It's only two pages.

JUDGE CONSTANTINE: All right, a five-minute recess.

(A five-minute recess was taken.)

JUDGE CONSTANTINE: On the record.

Please proceed, Mr. Bookstein.

CROSS-EXAMINATION

Q (By Mr. Bookstein) Is that your signature, Mr. Houck?

A Yes, it is.

Q I call your attention to number Paragraph 5 and ask you if it isn't a fact --

JUDGE CONSTANTINE: Well, let the record show what you're calling his attention to, because, you see, I know,

but who reads the record won't know. Is that his affidavit?

MR. BOOKSTEIN: That's correct.

JUDGE CONSTANTINE: All right, go ahead.

Q (By Mr. Bookstein) I call your attention to Paragraph 5 and ask you, Mr. Houck, if it isn't a fact that you told the Board representative that no Company representative had talked to you about the Union?

A Well, this was after I was called back.

Q I asked you, if you didn't tell the Board agent on November 26, 1973, that no Company representative had talked to you about the Union?

A Yes.

Q Pardon me?

JUDGE CONSTANTINE: I can't hear you.

THE WITNESS: In other words, what you're asking me in this statement here that I made to the Board, right, that nobody has talked to me?

Q (By Mr. Bookstein) Right, is that a statement made to the Board?

A Yes, and I signed it, but I should --

Q And did you do that on November 26, 1973?

A If that's the date, yes.

Q Is that the date on it?

A But I should have put in the statement that we had a talk before --

Q Is that the date on it?

A If that's the date on here, yes.

Q Well, take a look at it. Is that the date on it?

A It says November, 1973.

Q What date?

A The 26th.

Q Thank you.

MR. BOOKSTEIN: No further questions.

May the record show I'm returning the gentleman's statement.

JUDGE CONSTANTINE: Any redirect?

MR. SHERIDAN: No, your Honor.

JUDGE CONSTANTINE: All right, you may step down, Mr. Houck.

(The witness was excused.)

MR. SHERIDAN: General Counsel calls Robert Bishop to the stand.

Whereupon,

ROBERT BISHOP

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

JUDGE CONSTANTINE: Please give your name and address for the record.

THE WITNESS: Robert James Bishop, Pine Crest Trailer

Court, RD3, Ballston Spa, New York.

DIRECT EXAMINATION

Q (By Mr. Sheridan) Mr. Bishop, are you present employed by the Trading Port?

A Yes, I am.

Q And how long have you worked for them?

A 17 years.

Q Now prior to the strike, what was your job?

A I was truck receiving clerk.

Q Did you sign a card for the Union?

A I did.

Q And did you go out on strike with the other employees?

A I did.

Q And did you picket?

A I did.

Q What times did you picket?

A Every day that we were out, four hour shift.

Q Do you know what time that was? Was there any particular time that you picketed?

A Yes, from 12:00 noon to 4:00 in the afternoon.

Q Now during the time you were on the picket line, did you ever see Mr. Isadore Tabachneck out there?

A Occasionally, yes.

Q Do you recall any such occasion where you had a conversation with Mr. Gary Deyss?

A Yes, I did.

Q Do you recall when that was during the strike?

A Datewise, no, I couldn't recall.

Q Well, do you recall whether it was the first, second, or third week of the strike?

A I would say roughly the third week.

Q And was anyone else there when this conversation took place?

A Yes, my wife was there.

Q Anyone else?

A The rest of the pickets -- there was Glenn Passino, Gary Deyss. I think that was the three that was there.

Q And what was the conversation between Mr. Isadore Tabachneck and Gary Deyss?

A Well, he wanted to know who he was. They called the guy "Farmer", they never called him by his name. He said, "Farmer -- I don't employ no Farmer." So he wanted to know who he was, what he done there, how long he worked there, and then he related by name who he was.

Q That's Mr. Deyss said who he was?

A Right.

Q And then what, if anything, do you recall Mr. Isadore Tabachneck said at that point?

A Well, he said that as far as he was concerned, he wasn't employed there but he'd hire my wife before he'd hire

him.

Q And did your wife ever work there?

A No.

Q Now do you recall any other times when Mr. Isadore Tabachneck was at the picket line?

JUDGE CONSTANTINE: May I interrupt for just a moment -- you can ignore this, if you want; is there any dispute as to whether Deyss at that time was an employee?

MR. BOOKSTEIN: No.

JUDGE CONSTANTINE: Was he an employee?

MR. BOOKSTEIN: Oh, yes.

JUDGE CONSTANTINE: All right. I just want to be sure, that's all.

Go ahead, I'm done.

Q (By Mr. Sheridan) Were there any other times when you saw Mr. Isadore Tabachneck at the picket line?

A I think once after I did, after that.

Q And did he say anything?

A Not particularly to me, no.

Q Well, did you hear him say anything to anyone else?

A Well, he did talk to Fowler Riddick there at one time.

JUDGE CONSTANTINE: To whom?

THE WITNESS: Fowler Riddick.

Q (By Mr. Sheridan) Do you recall what he said?

MR. BOOKSTEIN: Was this in the witness's presence?

JUDGE CONSTANTINE: That's what he said.

MR. BOOKSTEIN: Did you hear it?

THE WITNESS: Pardon?

JUDGE CONSTANTINE: Did you overhear it?

THE WITNESS: No, I didn't hear it.

JUDGE CONSTANTINE: Oh, I thought he said he did. I'm sorry.

All right, then, I'll exclude it on the ground that he didn't hear it.

Q (By Mr. Sheridan) Do you recall any other instances When Mr. Isadore Tabachneck spoke at the picket line, though not directly to you but within your hearing?

MR. BOOKSTEIN: I would ask that the Trial Examiner instruct the witness on the difference between personally witness something and hearsay, because I think we've got a little problem here.

JUDGE CONSTANTINE: Just what you, personally, heard him say to somebody else; not what you were told about what he said.

THE WITNESS: No, I didn't hear him say anything to anybody else.

Q (By Mr. Sheridan) Now I'll direct your attention to on or about October 1st, 1973, after the strike, did you report to the warehouse?

A After the strike?